Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	**)**	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	**))))**	**MB Docket No. 05-311**

COMMENTS OF THE FIBER-TO-THE-HOME COUNCIL

Thomas W. Cohen
Edward A. Yorkgitis, Jr.
Erin W. Emmott
Theresa Gaugler
Kelley Drye & Warren LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)
EEmmott@kelleydrye.com

February 13, 2006

SUMMARY

The FTTH Council applauds the Federal Communications Commission ("Commission") for initiating this proceeding to examine ways in which the local franchising process may act as a barrier to the deployment of competitive cable ("multichannel video services" or "MVS") systems and to consider adopting regulations to further the Congress's objectives of promoting MVS competition and the deployment of advanced services to all Americans. The United States stands at a critical juncture, with cable, telecommunications, satellite, and wireless providers all seeking to build next-generation networks capable of providing converged voice, data, and video services. Where built, these networks have the potential to lower the price of MVS, increase the number and variety of services, and, provide next-generation broadband (including Fiber-to-the-Home ("FTTH")) capacity that will lay the foundation for entirely new businesses and industries. As the entity delegated by the Congress to implement national communications policy, the Commission has an obligation to ensure the Congress's objectives are furthered and, in this proceeding, it will have a critical opportunity to do so.

In his separate statement accompanying the Notice of Proposed Rulemaking, Commissioner Copps sets forth the rationale for this proceeding and the burden for parties commenting: "[i]f we find hard record evidence of problems [in the local franchising process] that need to be repaired, and can be repaired within the parameters of existing law, the Commission must consider taking those steps." Commissioner Adelstein's statement reflects a similar view: "[t]he larger question that hangs over this proceeding, though, is whether the local franchising process truly is a hindrance to the deployment of alternative video networks, as some new entrants assert." The FTTH Council herein presents hard and conclusive evidence that the

local franchising process far too frequently erects substantial barriers to new entry, and the FTTH Council believes that the Commission has more than sufficient legal authority to act to remove these barriers.

The cable television franchising process is a unique mixture of municipal rights-of-way ("ROW") management and economic regulation. The process we have today reflects its origins: the original cable franchises were *de jure,* or at least *de facto*, monopolies. The incumbent franchisees, while subjected to significant, and often costly, requirements by local franchising authorities ("LFAs"), had the offsetting advantage at one time of controlling virtually all of the MVS markets in which they operated. However, economic regulations suited for a monopolist are inapt for an entity seeking a competitive cable franchise. Moreover, today's MVS entrants that do not use municipal ROW are not subject to LFA regulations, putting the new entrant at even a greater potential disadvantage. Further, and of crucial importance for timely and efficient development of broadband infrastructure in an environment where users are increasingly demanding converged video, data, and voice services, the franchising authority only controls at most one service (cable) on a next-generation platform providing converged services. Thus, inappropriate requirements imposed on new entrants further skews entry in favor of or against certain providers. It is clear that the current local franchising process produces a policy anathema: it leaves the local governments in the potential position of picking winners and losers based on technology.

The current franchising process also has not adequately restrained the market power of cable operators to the detriment of consumers and others. Over the past decade, there are numerous reports from government and private entities concluding that the MVS market remains highly concentrated and dominated by cable operators even with recent market gains from other MVS providers. As a result, rates are above competitive levels, responsiveness to customers is diminished, and service provision is constrained. As these reports also demonstrate, these problems diminish when increased fiber-based competition is injected.

In these comments, the FTTH Council produces evidence from a variety of cable operators that have sought and are seeking to obtain local franchises that support the conclusion that specific actions by local franchising process too often deter, and at times prevent, new entry:

- The time it takes to obtain a franchise is often unreasonable, regularly lasting 6 to 9 months and not infrequently taking more than one year;
- "Level Playing Field" statutes and contract provisions, while having the patina of fairness, are in reality blatantly anti-competitive, serving to entrench the position of the incumbent;
- "Build-out" requirements that mirror the incumbent cable operator's infrastructure severely deter entry by new providers;
- There are a wide-range of "extraneous" requirements that further raise the cost of entry; and
- Franchise fees abuses occur regularly.

These actions by LFAs violate the specific requirement in Section 621 prohibiting the unreasonable refusal to award a franchise and the requirement in Section 706 to ensure the reasonable and timely deployment of broadband and other enhanced services. While Congress may not have intended that the Commission have exclusive jurisdiction to remedy these violations, it provided it with sufficient legal authority to address them by adopting regulations, including pursuant to Sections 201(b) and 4(i) of the Communications Act, or Section 706 of the Telecommunications Act of 1996, which would preempt and supersede inconsistent State and local laws and regulations. Further, a party aggrieved by a refusal of a franchising authority to adhere to these regulations can seek injunctive relief in federal or state court under Sections 635 and 635A of the Communications Act or pursuant to the Supremacy Clause and 28 U.S.C. § 1331.

Because the Commission has the legal authority to remedy these legal violations and proscribe barriers to entry, the FTTH Council urges it to adopt regulations that:

- Limit the time required to obtain a franchise to 4 months at most;
- Declare Level Playing Field laws, whether contained in state statutes, local ordinances, or in cable franchises, to be null and void;
- Permit new entrants to designate the territory within a franchise in which they will construct a cable system and ensure they are given a reasonable time to do so;
- Limit the ability of LFAs to use permissible PEG channel requirements to obtain services not essential to their provision or to impose other unreasonable requirements on applicants for competitive franchises;
- Prohibit the ability of LFAs to include non-video requirements; and
- Limit franchise fees to those that are for actual and reasonable compensation for use of ROW.

The Congress and Commission have long encouraged competition by fashioning different laws and regulations for new entrants than for firms that have market power. They also have encouraged deregulation. In this proceeding, the Commission should pursue both of these approaches. Encourage entry by knocking down the barriers imposed in the franchising process and, once new entrants have gained a firm foothold in the market, remove economic regulations that apply to incumbent cable operators. In the end, vibrantly competitive and unregulated MVS and converged services marketplaces will best serve consumers and our economy.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	**)**	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992	**)** **)** **)** **)**	**MB Docket No. 05-311**

COMMENTS OF THE FIBER TO THE HOME COUNCIL

The Fiber-to-the-Home Council ("FTTH Council"), through their undersigned counsel, hereby respectfully submits their comments to the Federal Communications Commission ("Commission") in response to the Notice of Proposed Rulemaking issued in the above-captioned proceeding.[1]

The FTTH Council is a non-profit organization established in 2001. Its mission is to educate, promote, and accelerate Fiber-to-the-Home ("FTTH") and the resulting quality of life enhancements. The FTTH Council's members represent all areas of the broadband industries, including telecommunications, computing, networking, system integration, engineering, and content-provider companies, as well as traditional service providers, utilities, and municipalities. As of today, the FTTH Council has over 120 entities as members.[2]

---

1 *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 05-189 (rel. Nov. 18, 2005) ("*Video Franchising NPRM*").

2 A complete list of FTTH Council members can be found on the organization's website, http://www.ftthcouncil.org.

I. INTRODUCTION

The cable television franchising process set forth in Title VI of the Communications Act of 1934, as amended (the "Communications Act")[3] is a unique mixture of public rights-of-way ("ROW") management and economic regulation. The ROW requirements reflect the fact that cable television operators deploying wireline networks use the municipal ROW and the municipality has the legal authority to set the terms for the time, place, and manner of such access. The economic regulations were added because, initially, cable television operators were monopolists in the provision of multichannel video services ("MVS") and Congress wanted to ensure that local franchising authorities ("LFAs") controlled this market power. As stated in "A Citizen's Guide to Cable Franchise Negotiations" by the non-profit organization Center for Digital Democracy:

> [i]n exchange for the local monopolies they enjoy, cable operators are required to negotiate for a *franchise* in the cities they serve, and these agreements include a number of community benefits … In addition to these tangible benefits of facilities, network capacity, and support, franchise agreements may also include a number of other provisions in the public interest.[4]

These two rationales for government control of local cable franchising led to an elaborate and lengthy negotiation process between municipalities and cable operators in the some 30,000 franchising jurisdictions. For a monopoly cable operator, the time required to obtain a franchise and the conditions imposed were burdensome, but the fact that, at the time, it had complete control of the market was considered sufficient recompense. For the municipality, it was able to generate new, significant revenues as well as require the cable operator to fund

---

[3] Codified at 47 U.S.C. § 151 *et seq.*

public, educational, and government ("PEG") channels and a variety of non-cable related projects, including the construction of institutional networks ("I-Nets"). As a result, a rough equilibrium between cable operators and LFAs was achieved.

For consumers, however, the franchising process did not offer sufficient protection to stem the market power of cable operators once they received their franchises. Rates for cable services kept climbing, and service complaints were legion.[5] Providers with new network technologies that could support MVS saw this state of affairs as an opportunity and clamored to enter into markets in competition with the former monopolists.

The difficulty would-be wireline-based competitors faced – and continue to face – is that the local franchising process was designed to control monopoly provision of MVS service and did not anticipate competitive entry. Unlike their monopolist forbears, new entrants into the MVS market have to win market share from the incumbent and compete against other new entrants. New entrants are highly unlikely to ever obtain and enjoy the fruits of market power. Consequently, the burdens of the pre-existing franchising process from the perspective of these new entrants are not offset by the benefits that the monopolists enjoyed – and hence competitive entry has been deterred. This problem is compounded by the fact that the LFA's legal reach only extends to MVS competitors that use the public ROW. Satellite and other wireless competitors avoid the franchising process completely, which skews the marketplace and places the

---

4 *Community Cable Cookbook, A Citizen's Guide to Cable Franchise Negotiations,* Center for Digital Democracy, available on line at http://www.democraticmedia.org/ddc/CCCIntro.php (*emphasis supplied*).

5 *See, e.g., Cable Television Consumer Protection Act of 1991*," S. REP. NO. 102-92 (June 28, 1991) at 3-11 ("*1992 Cable Act Senate Report*"). *See, also*, Chris Murray *et al.*, *Abusing Consumers and Impeding Competition: The State of the Cable Television Industry, 2002*, CONSUMERS UNION July 24, 2002, which states, "[c]able rates are up

. . .*Continued*

government effectively in the highly dubious role of handicapping technologies. Finally, with the deployment of next-generation broadband technologies, such as FTTH, cable operators, their competitors, and other providers are becoming converged services providers, capable of delivering not only MVS but also voice, high-speed data, and a host of new and innovative services.[6] LFAs oversee only one service on these networks – cable – but their regulatory actions in regard to cable can tilt entry and the overall competitive landscape in favor of incumbent cable operators and non-wireline providers for the provision of voice and data services, not just cable.

Given the realities of the current marketplace, the Commission is confronted by an immediate and substantial problem affecting fundamental communications policy in the United States: how to reform the local franchising process so that it is no longer a barrier to, but can serve to promote, the consumer benefits of MVS and converged services competition – and encourage broadband deployment.

For some 15 years, the persistent efforts of new entrants have chipped away at the monopoly position of cable operators in a number of markets, yet cable operators continue to have market power in most geographic areas.[7] Now, however, there is a sufficient mass of cable

---

45% since Congress passed the 1996 Telecommunications Act, nearly three times as fast as inflation" ("Murray *et al., Cable Television 2002 Report*").

6 S*ee*, COMMUNICATIONS DAILY at 11 (February 9, 2006) (an example of both a MVS competitor and a potential triple-play competitor that is not within the reach of local franchising authorities, is News Corp.'s plan to create a nationwide broadband wireless network).

7 *See Press Release on 12th Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, FCC 06-11, (rel. Feb. 10, 2006) at 3 ("*12th Annual Assessment Report, Press Release*"). Cable operators continue to serve the largest number of MVS subscribers nationwide, with market penetration at 69.4 percent of households subscribing to video services. Direct broadcast

. . .*Continued*

overbuilders ("Overbuilders") and incumbent local exchange carriers ("LECs"), in addition to satellite and wireless providers, seeking to deploy next-generation networks, including FTTH, and offer the "triple-play" of services (a combination of voice, data, and video) to consumers. The U.S. is approaching the tipping point where entry by these firms can occur in a great many markets, bringing with it competition and widespread next-generation network deployment to substantial numbers of consumers and businesses. In this proceeding, the Commission can solve many of the franchising problems that exist today by exercising its authority under the Communications Act and adopting regulations to ensure expedited and unfettered competitive entry. Such action will redound to the great benefit of American consumers and the economy as a whole. The FTTH Council urges the Commission to do so.

II. THE FRANCHISING PROCESS: MIXING RIGHTS-OF-WAY MANAGEMENT AND ECONOMIC REGULATION

Because they use the public ROW, cable operators have always been subject to some form of local approval, most often the requirement to obtain a franchise. Because for so long cable operators had exclusive licenses and there were no MVS alternatives to cable, cable operators were subject to various types of economic regulation – sometimes by the federal government and sometimes by state and local authorities. That is the essence of the relationship between cable operators and LFAs.

Over the past 50 years, this relationship evolved. During the last 15 years, changes have occurred at an accelerated pace, driven by the Congress and the Commission making competition the center of communications policy. At the beginning, the relationship between cable operators and LFAs was governed largely either at the state level or by LFAs. No

satellite ("DBS") providers account for 27.7 percent of households subscribing to video services.

uniform requirements existed. Later, the Commission intervened at times to control aspects of cable's activities, primarily to protect over-the-air broadcasting, but these regulations were relatively short-lived.[8] It was not until 1984, just as cable's reach was exploding with the construction of systems in urban markets and the delivery of programming via satellite, that Congress established more uniform national requirements for the award of initial franchises and renewal of them.

The focus of the Cable Communications Policy Act of 1984 ("1984 Cable Act")[9] on franchising facilitated the growth of cable systems, but it proved insufficient to address the market power almost all operator's enjoyed within their franchise areas. Thus, in 1992, Congress reentered and adopted provisions to control cable's horizontal market power and the leveraging of that market power to the detriment of consumers, programmers, and competitors.[10] One of those remedial actions was to prohibit the granting of exclusive franchises.

The ink was barely dry on the 1992 Cable Act when Congress finally was able to rewrite the Communications Act based primarily on pro-competitive policies for all industry sectors, including cable.[11] The 1996 Act also was notable for having the Commission establish national rules implemented by states and localities and for giving the Commission the authority

---

8 Commission intervention began with its decision in *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), denying the application of a cable operator to important distant signals. In 1972, the Commission adopted wide-ranging rules dealing with such issues as rates, signal carriage, franchise fees, and channel capacity. 36 F.C.C. 2d 143 (1972) ("1972 Rules"). By 1980, the Commission ended most of these regulatory requirements. *See*, for instance, *Report & Order in Docket Nos. 20988 and 21284*, 79 F.C.C. 2d 663 (1980).

9 Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779.

10 *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act").

11 *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

to preempt state and local actions inconsistent with pro-competitive telecommunications policy.[12]

A. **1984 CABLE ACT: *FORMALIZING THE FRANCHISING PROCESS***

Prior to the enactment of the 1984 Cable Act, cable franchising was largely an informal, *ad hoc* process conducted by LFAs without any guidance.[13] Virtually all LFAs presumed there could be and licensed only one cable operator per community, a *de facto, if not de jure* monopoly. Thus, it was of vital importance that the LFA not only enforce its ROW management authority, but also establish economic regulation of the cable operator since competition would not be present to discipline the cable operator. Cable operators largely acquiesced to obligations in direct consideration for their monopoly position. Because there was no standardized process, a cable operator was subject to different processes and different requirements with each LFA, processes that were typically lengthy, unpredictable, and expensive.[14]

In an effort to reduce the LFA's unfettered discretion in the franchising process, the 1984 Cable Act, among other things, established specific procedures for both obtaining and renewing a cable franchise agreement. The 1984 Cable Act drastically reduced the authority of the LFA to impose rate regulation on cable operators but allowed LFAs to impose specific requirements on cable operators as conditions for obtaining a cable franchise agreement. Specifically, the 1984 Cable Act permitted LFAs to:

- Impose network upgrade requirements on cable operators;

---

12 *See e.g.*, 47 U.S.C. § 253(d).

13 *See* John Throne *et al.*, FEDERAL BROADBAND LAW 179 (Little Brown & Co., Law & Business 2002).

14 *See Cable Telecommunications Act of 1983,* S. REP. NO. 98-67 at 4-6 (1983).

- Establish requirements relating to facilities, equipment and services;
- Impose cable franchise fees up to a limit; and
- Require the provision of, and access to, channels dedicated to public, education and government use.

The franchise process established by the 1984 Cable Act limited LFA regulation of cable operators. LFAs were restricted in the amount of franchise fees they could impose,[15] their demands for video-related requirements, and the grounds on which LFAs could deny a franchise renewal.[16] In addition, with some limited exceptions, LFAs were no longer permitted to regulate the rates of the cable operator. As for non-video related requirements, Congress attempted to shut these down entirely. Cable providers were thus subject to more uniform requirements from the LFAs during the franchising process. In sum, the 1984 Cable Act created greater certainty for cable operators in the franchising process and permitted LFAs to be compensated for use of their ROW and to exercise various types of economic control.

B. 1992 CABLE ACT: *OPENING THE CABLE MARKET TO MULTIPLE FRANCHISES*

The growth in the cable industry during the 1980's was very impressive; yet, government oversight was not sufficient to rein in the market power of cable operators[17] or to prevent abuses by LFAs in the franchising process.[18] Thus, Congress once again stepped in and

---

15 47 U.S.C. § 542(b). In its 1972 Rules, the Commission had established a policy requiring review of franchise fees set above 3% of gross revenues. With the passage of the 1984 Cable Act, this was no longer required.

16 47 U.S.C. § 546.

17 *See 1992 Cable Act Senate Report* at 3-11.

18 *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service,* 5 FCC Rcd 4962 ¶ 131 (1990) (noting that "regulatory activities of some local authorities may discourage or even preclude competing cable systems or other competing multichannel media") ("*1990 Report on Cable TV*").

enacted legislation, the 1992 Cable Act. The 1992 Cable Act, among other things, allowed both state and local governments and the Commission the ability to assert control over the rates for non-premium cable service channels.[19] The 1992 Cable Act also gave the Commission the power to establish both vertical and horizontal ownership limits for cable companies.[20]

Of greatest relevance for this proceeding, the 1992 Cable Act abolished the virtually universal practice of granting exclusivity to the incumbent cable operator. Noting that there was "no valid reason to discourage or forbid competing systems,"[21] the Commission had recommended to Congress that amendments to the 1984 Cable Act be made to forbid exclusivity in cable franchises,[22] finding that they were directly contrary to federal policy.[23] Based on the Commission's recommendation, the 1992 Cable Act prohibited the granting of exclusive cable franchises by LFAs and provided remedies should an applicant's request for a franchise be unreasonably denied.[24] Overbuilders and others appeared willing to seize the opportunity to create new networks and innovative service offerings in competition with the incumbents.

C. 1996 TELECOMMUNICATIONS ACT: *REMOVING BARRIERS TO ENTRY*

The 1996 Act culminated a lengthy effort by Congress to rewrite the Communications Act and base communications regulation and policy on the promotion of robust

---

19 47 U.S.C. § 543(a)(2).

20 47 U.S.C. § 533.

21 *1990 Report on Cable TV* at ¶ 138.

22 *Id.* at ¶ 141 (noting that the Congress should forbid LFAs from "unreasonably denying a franchise to applicants that are *ready and able to provide service.*") (*emphasis supplied*).

23 *See Cable Television Consumer Protection and Competition Act of 1992*, H. REP. NO. 102-862 at 77 (1992) ("*1992 Cable Act House Report*").

24 47 U.S.C. § 541(a)(1). *See also, 1992 Cable House Report* at 78 (finding that the legitimate basis on which a LFA may consider a franchise application were intended to be specific).

competition. Congress also sought to promote the ubiquitous deployment of advanced services to all Americans, without regard to the type of technology used to accomplish the task.[25] One critical feature of the 1996 Act was that it removed barriers to entry into the telecommunications market. Section 253 specifically bars state or local governments from imposing any requirements that prohibit or have the effect of prohibiting the provision of telecommunications services within their jurisdictions.[26]

In regards to cable regulation, two important pro-competition changes were enacted to help facilitate entry into the video services market by new entities. First, open video system ("OVS") operators were exempted from both the franchise fee requirement and the franchising process imposed on cable operators.[27] This would allow OVS operators to more quickly deploy systems providing consumers with access to advanced services. Second, the 1996 Act permitted entry by incumbent LECs into the MVS market. However, unlike with OVS providers, Congress continued to subject wireline MVS operators to the cable franchising process with the LFA.

The 1996 Act also immediately deregulated small cable systems,[28] which, at the time of its passage, served about 20 percent of the estimated 61 million cable households in the United States.[29] The 1996 Act further ended cable rate regulation as of March 1999 for all but

---

25 47 U.S.C. § 157(a).

26 47 U.S.C. § 253(a).

27 47 U.S.C. §§ 571(a)(4) and 573.

28 47 U.S.C. § 543(m).

29 *See* Crandall *et al.*, *The Competitive Effects of Telephone Entry into Video Markets*, CRITERION ECONOMICS, L.L.C., (2005) at 13 ("Crandall Paper"). (Financial support for this paper was provided by the Internet Innovation Alliance.)

the basic tier of cable service offerings.[30] Cable operators were now permitted to increase rates without prior notice to their customers if costs rose due to a change in regulatory fees or franchise fees imposed by the LFA or other government entity.[31]

D. THE EVOLUTION OF NATIONAL COMMUNICATIONS POLICY: *ITS EFFECT ON THE CABLE FRANCHISING PROCESS AND ITS RELEVANCE FOR COMMISSION ACTION IN THIS PROCEEDING*

Title VI of the Communications Act and the cable franchising process have evolved significantly over the decades to reflect changes in national communications policy. At first, Congress viewed the process as a way to compensate localities for use of their ROW and to impose economic regulation to control cable's market power. Later, in enacting the 1992 Cable Act and the 1996 Act, Congress recognized the value of and potential for competition, as well as the limits of regulation. It also understood that the Commission should play a vital role in establishing national standards that could be implemented by other regulatory bodies. The Commission in this proceeding has the opportunity, by removing barriers to entry, to promote the maximum development of competitive MVS and converged services alternatives. The Communications Act gives the Commission sufficient authority to achieve this public interest objective. As the next sections will make clear, the benefits from the Commission taking these actions are substantial.

III. THE STATE OF THE MVS AND CONVERGED SERVICES MARKETS TODAY AND THE SIGNIFICANT BENEFITS OF EXPEDITED AND UNFETTERED ENTRY

We are witnessing a major shift in market structure: from providers offering services just in a standalone MVS market to their offering the triple-play of converged voice,

---

30 47 U.S.C. § 543(c)(4).

31 47 U.S.C. § 543.

data, and video services. As demonstrated in this section, this shift – when combined with the removal of barriers to entry – enables the introduction of a plethora of new services at lower prices and the deployment of next-generation broadband networks, particularly FTTH, which can bring even greater benefits in the future. It is clear that in this proceeding consumers have a great deal to gain.

A. EXPEDITIOUS AND UNFETTERED ENTRY PRODUCES CONSUMER BENEFITS

Federal communications policymakers agree without exception that competition is beneficial and should drive their decisions. Competition produces lower rates, more services, greater innovation, and improved quality. Advancing competition has particular resonance with policymakers dealing with the cable industry and the MVS market. For the past 20 years, policymakers have attempted to corral the market power of local cable operators. As discussed above, this concern drove Congress's passage of the 1992 Cable Act with its provisions imposing rate regulation, requiring access to programming, and limiting horizontal and vertical ownership. It drove cable-related amendments in the 1996 Act that sought to open the MVS market to greater competition. As demonstrated by the evidence from the Commission's *12th Annual Assessment Report* on the status of competition in the MVS market, this market is far from fully competitive.[32] As a result, rates remain above competitive levels, and services are

---

32 *12th Annual Assessment Report, Press Release* at 1. In assessing the competitiveness of a market, it is first critical to define the market and the providers that compete (that is, providers that are substitutes) in that market. Despite claims of a wide variety of providers, the Commission limits the providers in the *Annual Assessment* of the MVS market to DBS and home dish providers, Overbuilders (including ILECs), television broadcasters, fixed wireless operators, and private cable operators. Of those, cable operators have a 69.4% market share. The Herfindahl-Hirschman Index ("HHI"), which is a standard tool used by the Department of Justice and Federal Trade Commission, can then be calculated to indicate market concentration. In the case of the MVS market, using the Commission's market share statistics, the cable operator's HHI is almost 5000.

. . .*Continued*

constrained. This proceeding presents an excellent opportunity for the Commission to address these problems by lowering barriers to entry imposed by the franchising process. By doing so, the Commission will promote a more competitive environment, driving rates to competitive levels, increasing services, and enhancing the overall economic growth of this nation.

Reports by the General Accounting Office (GAO) provide hard evidence from which the Commission can determine the benefits of expanded entry. Over the past several years, the GAO has examined the MVS market and written a series of reports for various Congressional Committees. Its key finding is that the presence of a second cable operator in a market results in rates approximately 15% lower than in areas without competition – or about $5 per month.[33] The GAO also found that competition increases the amount of services provided to

---

Under the DOJ-FTC *Horizontal Merger Guidelines* (revised 1997), the agencies consider an HHI above 1800 to indicate a highly concentrated market.

33 *Telecommunications: Issues in Providing Cable and Satellite Television Services*, Report to the Subcommittee on Antitrust, Competition, and Business and Consumer Rights, committee on the Judiciary, U.S. Senate, UNITED STATES GENERAL ACCOUNTING OFFICE, GAO-03-130 (Oct. 2002) at 8 ("…the presence of a second cable franchise (known as an overbuilder) does appear to constrain cable prices. In franchise areas with a second cable provider, cable prices are approximately 17 percent lower than in comparable areas without a second cable provider").

See also Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry, Report to the Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, UNITED STATES GENERAL ACCOUNTING OFFICE, GAO-04-8 (Oct. 2003) at 3 ("Competition from a wire-based provider … is limited to very few markets. However, in those markets where this competition is present, cable rates are significantly lower – by about 15 percent – than cable rates in similar markets without wire-based competition"); at 10 ("[w]ith an average monthly cable rate of approximately $34 that year, this implies that subscribers in areas with a wire-based competitor had monthly cable rates about $5 lower, on average…").

See also, Murray *et al.*, *Cable Television 2002 Report*, which states, "[a] Los Angeles Times article on cable overbuilders examined rates all across LA County for expanded and basic cable service, comparing towns where there was competition with towns where there was not. That article found that basic cable was 60% more expensive in cities

. . .*Continued*

consumers.[34] It is evident from these GAO reports that existing multichannel video subscribers would reap real benefits from additional entry, particularly by fiber-based competitors.

The Commission's own reports support this conclusion. In the *12th Annual Assessment Report, Press Release*, the Commission found that the MVS market was still concentrated and that, despite increased competition from additional MVS providers, cable operators were generally not "lowering prices charged to customers."[35]

---

without competition (39% of a per channel basis), and expanded basic was 15% more where there was no competition (29% on a per channel basis)."

34 GAO-03-130 at 9 ("[i]n areas where both DBS companies provide local channels, our model results indicate that cable companies offer subscribers approximately 6 percent more channels").

See also GAO-04-8 at 3 (… the DBS provision of local broadcast stations has induced cable operators to improve the quality of their service by providing their subscribers with approximately 5 percent additional cable networks."); at 10 ("…interviews with cable operators also revealed that these companies generally lower rates and/or improve customer service where a wire-based competitor is present. For example, 1 cable operator told us that it stopped raising rates 3 years ago in one market where a wire-based competitor had entered").

See further, Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets, Report to the Subcommittee on Antitrust, Competition Policy and Consumer Rights, Committee on the Judiciary, U.S. Senate, UNITED STATES GENERAL ACCOUNTING OFFICE, GAO-04-241 (Feb. 2004) at 4 ("… of the 12 markets we examined, it appears that BSPs' [Broadband Service Provider] entry into a market benefited consumers in the form of lower prices for subscription television, high-speed Internet access, and local telephone services … The rates for telecommunications services were generally lower in the 6 markets with BSPs than in the 6 markets without a BSP. For example, basic cable television rates were 15 to 41 percent lower in 5 of the 6 markets with a BSP when compared with their matched market. The prices were also generally lower in markets with BSPs for local telephone and high-speed Internet service"); at 13 ("… incumbent cable providers facing competition from a BSP told us that they responded to the BSP activity by lowering rates or offering special deals or packages and, in some cases by providing more local content and advanced services").

35 *12th Annual Assessment Report, Press Release* at 1-2.

In the Commission's 2005 Report on Cable Industry Prices accompanying the *11th Annual Assessment Report*[36] it concluded that during 2003 in non-competitive markets the average monthly cable rate increased by 5.6% while the average price increase in competitive markets was only 3.6% over the same period.[37] Further, monthly rates for the entire competitive group were lower by 7.3% than for the non-competitive group.[38] On a price per channel basis, the competitive group's rates were lower by 11.0%. For the Overbuilder segment of the competitive group only, the average monthly rate was lower by 15.7% (which is consistent with the GAO finding) and per channel rate was lower by 27.2%.[39] Both of these are very significant and relevant to this proceeding.

The magnitude of these rate decreases caused by wireline competition is corroborated by the rates charged in Keller, Texas where Verizon last September deployed its triple-play product. The following is a comparison of the cable rates offered in that market. The price for Verizon's "Everything" video package (266 channels) is 13% (or $12.14) below the incumbent cable operator, which offers 200 channels.

---

36 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report ("11th Annual Assessment Report"),* MB Docket No. 04-227, at ¶ 4 (2005). The cable price report accompanying the *12th Annual Assessment Report* has not yet been released.

37 *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment,* MM Docket No. 92-266, at ¶¶ 10-11, 44 (2005) ("*2004 Basic Service Rate Report*"). The Commission distinguishes non-competitive from competitive markets based on the statutory definition of the term "effective competition," 47 U.S.C. §543(a)(1)(A-D). Therefore, unlike the GAO reports, the rate comparisons are based on different types of competitors and not just Overbuilders. The Commission finds that, as of January 1, 2004, the competitive group consists of 997 communities, which amount to less than 10% of the cable subscribers nationwide.

38 *2004 Basic Service Rate Report* at ¶ 12.

39 *Id*. at ¶ 12.

Comparison of Rates in Keller, TX								
	Verizon		Charter		DirecTV		DISH	
	Channels	Monthly rate	Channels	Monthly rate	Channels	Monthly rate	Channels	Monthly rate
Basic package	15-35	$12.95	30	$17.05			60	$26.99
Expanded basic	180	$39.95	70	$46.99	135	$41.99	120	$37.99
Value package			120	$52.99	155	$45.99	180	$47.99
Everything	**266**	**$79.85**	**200**	**$91.99**	**215**	**$93.99**	**230**	**$86.99**

Notes: Verizon – Everything includes 180 channels in expanded basic, 15 sports channels, 45 movie channels, 14 HBO channels and 12 Cinemax channels
Source: Company websites
UBS Investment Research, Wireline Telecommunications, *"TelcoTV Update – Full Steam Ahead"*, 22 September 2005, p.2

The effect of competition on rates is further demonstrated by the fact that in portions of Pinnellas County, Florida where Knology is the Overbuilder, the incumbent cable operator offers rates $10 to $15 lower than rates in those areas of the country where it faces no competition.[40]

A 2005 Crandall Paper reinforces the beneficial impact of increased competition on rates. Using the Commission's Report on Cable Industry Prices, the authors calculate that cable subscribers' monthly rates would decrease by $7.15 – from an average of $45.56 (in 2004), or almost 16%. Further, the paper calculates the annual savings for all subscribers to exceed $5 billion annually (assuming wireline competitors enter all markets), and the annual welfare increase among subscribers in non-competitive markets would approach $6 billion annually (again assuming ubiquitous entry).[41]

More recently, a paper entitled, "In Delay There Is No Plenty: The Consumer Welfare Cost of Franchise Reform Delay," seeks to estimate the consumer effect of delays

---

40 Declaration of Felix Boccucci, Jr. of Knology at ¶ 24 ("Boccucci Declaration"), attached hereto as *Attachment A.*

41 Crandall *et al.*, at 22-23.

caused by the franchise process.[42] The authors conclude that "the present value of this consumer welfare loss [from a delay in franchise reform] is quite significant – $8.2 billion dollars for one year of delay, or nearly $75 dollars for each American household."[43] The paper concludes that four years of delay cost about $30 billion or about $270 per household.[44]

Even if the data and calculations in these reports are not fully refined, their very magnitudes provide strong evidence that the gains from expeditious and unfettered new entry are substantial. For instance, in terms of subscriber rates, the gain is much greater than the 5% price differential that is considered competitively significant under the *Merger Review Guidelines*.[45] Similar gains should be seen in investment, jobs, and economic growth. This proceeding provides the Commission with a rare opportunity to create real, immediate, and substantial benefits for most Americans.

B. EXPEDITIOUS AND UNFETTERED ENTRY WILL GREATLY ACCELERATE BROADBAND (ESPECIALLY FTTH) DEPLOYMENT

FTTH networks provide the most advanced next-generation network capability because: (1) the inherent, virtually unlimited capacity of optical fiber makes the network relatively "future-proof"; (2) they uniquely enable two-way interactive broadband communications, which is limited in other media by asymmetric characteristics; (3) all-optical networks are the most secure access network alternative; and (4) the operational costs of all-optical networks are most favorable. This tremendous capability permits FTTH networks to

---

42 George S. Ford & Thomas M. Koutsky, *"In Delay There Is No Plenty": The Consumer Welfare Cost of Franchise Reform Delay*," PHOENIX CENTER POLICY BULLETIN NO. 13, (Jan. 2006).

43 Ford & Koutsky, PHOENIX CENTER POLICY BULLETIN NO. 13, at 9.

44 *Id*.

45 *FTC-DOJ Horizontal Merger Guidelines*.

transmit simultaneously converged voice, enormous data files, and multiple streams of video to and from the subscriber. Applications such as distance-learning, health care monitoring, and unlimited video-on-demand, which were once far out-of-reach, are now easily accessible with FTTH. As such, these networks will be of fundamental importance for our economic growth. This conclusion is supported by a recent study by researchers at the Massachusetts Institute of Technology and Carnegie Mellon University, entitled "Measuring Broadband's Economic Impact," which found that communities with mass-market broadband deployment experienced more rapid growth in employment and business generation.[46]

FTTH deployment also is critical to U.S. competitiveness. The U.S. economy has often been called an "information economy." More and more, at our homes and in our businesses, we are accessing huge amounts of electronic information. New industries have developed around ensuring people can access and then manipulate this information. Just look at Google, Yahoo, eBay, and Amazon. More importantly, a vast array of new concepts and businesses are on the drawing board premised on the existence of next-generation networks. As with our leadership in developing the Internet, the U.S. has the opportunity to be the birthplace for these new drivers of our growth and increased international competitiveness.

In the last few years, the U.S. has seen greater deployment of FTTH networks. As of last September, 652 communities in 46 states had FTTH installations, representing year-to-year growth of 200%.[47] Moreover, with Verizon's commitment to deploying FTTH networks, the pace has increased. There is no question that, even with this increase, the United States

---

46 William Lehr *et al.*, "*Measuring Broadband's Economic Impact*," presented at the 33rd Research Conference on Communication, Information, and Internet Policy, Sept. 23-25, 2005 (Revised Oct. 4, 2005).

continues to lag behind other countries in both general broadband penetration and FTTH deployment. It has been widely reported that, as of the middle of last year, the U.S. had fallen to 19th in the world in terms of broadband penetration.[48] Even more important, when it comes to next-generation technology – FTTH, the U.S. has fallen far behind such countries as Japan, Korea, and Sweden. France Telecom is about to deploy FTTH throughout France. Moreover, we continue to see large European cities like Vienna, Amsterdam, and Paris embark on comprehensive FTTH overbuild. In their August 2005 report, the Free Press, Consumer Federation of America, and Consumers Union state, "[J]apanese consumers have access to broadband connections with speeds up to 100 Mbps."[49] It is clear the U.S. has a problem, one that will resound to the detriment of consumers and the economy, unless measures are taken to reduce substantially or eliminate this gap.

FTTH deployments are significant capital investments that depend in today's marketplace on the providers' ability to sell the entire package of voice, data and video services – with their substantial revenue stream – to achieve a sufficient return on the investment. Therefore, the time to obtain a franchise approval, as well as the requirements imposed on the entrant, become critical factors in determining how quickly the facilities can be constructed and whether, once constructed, there will be a sufficient return. In an attached declaration, Jeff Mnick of the Guadalupe Valley Telecommunications Cooperative [GTVC] makes this point:

> GVCS [GTVC's cable subsidiary] contemplated upgrading and expanding its cable network with [Fiber-to-the-Premises

---

47 *FTTP/FTTH Update*, RENDER, VANDERSLICE & ASSOCIATES (Oct. 4, 2005). This report can be found on the FTTH Council's website.

48 *The Voice of Broadband*, BROADBANDFRIENDS.COM, Vol. 1, Issue 4 at 1, (Sept. 15, 2005).

49 S. Derek Turner, *Broadband Reality Check*, FREE PRESS, CONSUMER FEDERATION OF AMERICA, AND CONSUMERS UNION, at 6 (Aug. 2005).

> (“FTTP”)] so it could offer the “triple-play” of services [in the City of Bulverde, Texas]. FTTP also would provide numerous cost advantages over the life of the network. This cable system was originally constructed and operated at a time when a franchise was not required. GVCS determined that the expansion of the network would require it to obtain a new municipal franchise agreement. However, in addition to the time and costs associated with obtaining a franchise agreement, GVCS understood from the city that it would be required to meet all the requirements Bulverde had imposed on the incumbent cable operator. This included a build-out requirement to aerial subdivisions with at least 40 homes per mile and buried subdivisions with at least 80 homes per mile. GVCS determined that this requirement would make the expansion of its network uneconomical. It therefore decided not to expand its network and did not seek a franchise in the city of Bulverde.[50]

Since then, Texas has passed a state-issued franchise law that facilitates entry. In October, GVCS was awarded a State Issued Certificate of Franchise Authority. Immediately, it began constructing a FTTP network and has already launched its services.[51]

Another example of delayed FTTH deployment is currently occurring in Tampa, Florida. Here, Verizon has been stymied in obtaining a franchise for over 20 months to deploy its FTTH network (known as “FIOS”), and it is unclear when there will be a resolution.[52]

A 2005 article, “The Hidden Costs of Broadband,” provides rough calculations of the tremendous increase in cost from the franchising process, which acts as deterrent to entry:

> For Hanover as an example, the cost [of the franchising process] … was estimated to be about $500,000, or $200 per household. At 25% penetration this is an added $800 per subscriber … If a FTTH

---

50 Declaration of Jeff Mnick of Guadalupe Valley Telecommunications Cooperative at ¶ 5 (“Mnick Declaration”), attached hereto as *Attachment B.*

51 Mnick Declaration at ¶ 7.

52 Dionne Searcey, “As Verizon Enters Cable Business, It Faces Local Static,” THE WALL STREET JOURNAL, at A1 (Oct. 28, 2005).

> system was about $1,600 per subscriber without any of these costs, franchising alone is a 50% increase in the costs.[53]

A similar amount was expended by Knology to obtain a franchise in Nashville, Tennessee.[54]

The U.S. stands at a crossroads in the development of FTTH and other next-generation networks with large incumbent LECs like Verizon, Overbuilders like Grande and Knology, and smaller, more rural companies like GVCS poised to take the risk of deploying these networks. There is sufficient evidence to demonstrate that the franchising process and the economic regulation that can be imposed in that process are critical factors in determining whether these networks are built. If the Commission is to fulfill its mandate under Section 706 of the 1996 Act – and ensure the timely and reasonable deployment of broadband – and if Congress's objective in having a competitive cable marketplace is to be achieved, the Commission needs to remove all barriers erected by the local franchising process.

IV. THE COMMISSION MUST PREVENT THE FRANCHISING PROCESS FROM SERVING AS THE ROADBLOCK TO COMPETITION

As demonstrated above,

(1) Having the LFA oversee economic regulation in the franchising process without federal oversight is inconsistent with the intent of Congress to have a national communications policy;

---

53 Terrance P. McGarty, *The Hidden Costs of Broadband, Franchises, Internet Access, Litigation and Industry Change*, THE TELMARC GROUP, LLC at 4 (2005), attached to the Declaration of Terrance P. McGarty, Attachment 1 ("McGarty Declaration"), attached hereto as *Attachment C.* Mr. McGarty determined this cost based on "eighteen months of two people plus lawyers plus engineering and marketing teams." *Id.* at 3.

54 Boccucci Declaration at ¶ 21. The effect on a cost per subscriber basis will be less in Nashville Tennessee, because it has a larger population than Hanover, New Hampshire. In addition, the FTTH Council recognizes that these examples may be at the higher-end of the range, but, as will be discussed later in the comments, the economics of FTTH

. . .*Continued*

(2) It is not sound economics or policy to have the LFA oversee economic regulation of cable services when other, competing MVS may not be subject to such regulation and when cable services is only one service element of converged services networks which are becoming increasingly deployed;

(3) Competition in the delivery of MVS by fiber-based providers is a boon to consumers; and

(4) Removing the barriers to entry in the local franchising process will accelerate the deployment of next-generation networks.

In this section, the FTTH Council will describe the actual barriers that are erected to new entrants by the current, unrestrained franchising process. In 1994, the Commission recognized that "[t]he local franchising process is, perhaps the most important policy-relevant barrier to competitive entry in local cable markets."[55] When the cable industry first sought to have the federal government eliminate barriers to entry two decades ago, they identified LFAs as an obstacle to normal operation of the marketplace for video services:

> [T]here is a basic misconception that the relationship between a city and a cable operator is that of buyer-seller. This line of reasoning holds that any demand a city makes, however unreasonable, is just part of the normal customer-supplier negotiating process. Nothing, however, could be further from the truth. The cable operator may be the seller but the city is not the buyer – those are the residents in the community. The city is a barrier standing between a cable operator and his potential customers. It is definitional that a barrier of that kind extracts a tribute from those wishing to surmount the obstacle. The city is not the buyer of a cable service for its people. It is, at best, the

---

deployment are sufficiently sensitive that even smaller increases in costs will have an effect.

55 *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, 9 FCC Rcd 7442 (Appendix H) at 43 (1994).

> broker, through whom the seller must go if he is to ever reach his potential market. Like any broker, the city extracts a price for permitting access to the potential customer … I don't know of any other private enterprise where a city can demand free services as the price of doing business.[56]

The 1984 Cable Act was supposed to address these complaints, and, to some extent, for *monopoly* cable operators it eliminated some excesses, improved the process, and facilitated entry, but it did nothing to promote competitive entry. In fact, the 1984 Cable Act created a symbiotic relationship between the incumbent cable operator and the franchising authority. Cable operators got market power; LFAs got revenues and free services. In a very real sense, this was "the beginning of a beautiful relationship."[57] Over 20 years later, these parties have incentives to maintain this relationship and prevent, or at least hamper, new wireline entry. Despite the 1992 Cable Act's prohibition against exclusive franchises, new entrants today face LFA-created or LFA-enhanced barriers at least equally as high as those cable complained about prior to the 1984 Cable Act. The market realities today are such that the solution the cable industry could live with in the days of monopoly has run its course. Moreover, unlike the cable operator of the 1980s, today's would-be fiber-based entrants are battling both the LFAs and the incumbent cable operators.

---

[56] Statement of Thomas E. Wheeler, President, National Cable Television Association, before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, U.S. Senate, 98th Cong. 1st Sess., Hearings on the Cable Telecommunications Act of 1983 (Feb. 17, 1983) ("Wheeler Statement").

[57] This is a paraphrase of the words of Rick Blaine in *Casablanca*.

A. THE FRANCHISING PROCESS IN THE MVS AND CONVERGED SERVICES MARKETS CREATES BARRIERS TO ENTRY[58]

1. *The Franchising Process Takes Too Long*

Far too often the time it takes to obtain a franchise agreement from a LFA is unreasonably long and serves as a deterrent for new entrants into the MVS and converged services markets. The model for expedited entry is the recently enacted Texas state-issued franchise law where the Public Utilities Commission of Texas awards a franchise before the 17th day after receipt of a completed application.[59] However, in no other state do franchising authorities come close to meeting this standard.[60] Instead, at best, the process is completed in a

---

58 LFAs and incumbent cable operators argue that all new entrants requiring a cable franchise should be subject to the same requirements. (*See*, for instance, the Testimony of the Honorable Marilyn Praisner on behalf of the NATOA, NLC, USCM, and NACO before the House Energy and Commerce Committee, (Nov. 9, 2005). *See also Comments of the National Cable Telecommunications Association*, MB Docket No. 05-255 (filed Sept. 19, 2005). However, it is important to note that new cable entrants are not treated more favorably than incumbent providers when they are burdened with the same requirements as incumbents yet do not have the same market power as them. The Commission has long recognized in the telecommunications industry that different requirements should apply to different providers depending on the degree of market power each possesses. Here, the Commission we are sure recognizes that new entrants into the larger MVS market by virtue of using different technologies already are not subject to identical or even similar requirements. At the end of the day, the FTTH Council believes the goal of the Commission is to first inject competition and then deregulate. In the MVS market, as soon as new entrants have gained a firm footing, regulations on incumbent cable operators should be immediately reduced and then eliminated. That is the consistency in policy the Commission should embrace. Finally, the Commission should endeavor to ensure that entry into all components of converged services is expeditious and equivalent. Today, because most regulatory requirements have been streamline or removed entirely, it is relatively easy for cable operators to enter the voice and data markets utilizing their converged services platforms, and telecommunications providers should have a similarly easy time entering the MVS market.

59 TEX. UTIL. CODE ANN. § 66.003.

60 On February 6, 2006, the Virginia Senate and House passed similar legislation (SB 706 and HB 1404) which would set a 120 day time limit for LFA consideration once an application is filed.

matter of a few months. More often, it takes six months or longer, and it is not unusual for the process to last much longer. Regardless, if any new entrant seeks to deploy facilities and services nationwide, they must enter into the process with over 30,000 LFAs.[61] This number alone is a barrier to entry.

Evidence of a reasonable amount of time required for new entrants to gain a franchise is available from a variety of sources in addition to the Texas statute. In the attached declaration from Felix Boccucci, Jr. of Knology, he states that the company, which has obtained about 70 local franchises**,** had positive experiences in many smaller towns where the process took "less than 6 months."[62] He adds, "There is no reason the process cannot be completed within 4 months at most."[63] Finally, the GAO stated its February 2004 report, "[w]e were told that two enthusiastic local franchising authorities took only 120 days to approve a BSP's application for a franchise."[64] Therefore, there is a record that a reasonable period of time, at most, is approximately 4 months. (This, of course, should not be seen as the optimum time for accelerating new entry, which would be similar to the deadline imposed in the Texas statute.)

At the same time, there is a large body of evidence demonstrating that the process often takes much longer:

---

61 *See Comments of United States Telecom Association*, MB Docket No. 05-255 (filed Sept. 19, 2005) at 19 (noting to negotiate with 30,000 LFAs, for transactional costs alone, is a barrier to entry); *see also* GAO-04-241 Report at 20 (citing the need to "fulfill costly franchise requirements" as a direct consideration for entering a market). *See also*, *Comments of BellSouth*, MB Docket No. 05-255 (filed Sept. 19, 2005) at 6 (noting that the franchising process is "costly, time-consuming and susceptible to abuse by a variety of parties")("BellSouth Comments").

62 Boccucci Declaration at ¶ 23.

63 *Id.* at ¶ 11.

64 GAO-04-241 Report at 21.

- It took Knology 10 months to get a franchise in Louisville, Kentucky (after which a lengthy appellate process occurred further delaying entry) and almost as long in Nashville, Tennessee.[65]

- In the attached declaration from Andy Sarwal of Grande Communications (which had almost 50 local franchises before being awarded a single, state-issued franchise in Texas), he states, "[i]n major cities, it took at least 9 months to obtain franchise agreements; in smaller cities, approximately 6 months was the average time required to obtain a franchise."[66]

- In another declarant, Terry McGarty explains that for his firm the process in Hanover, New Hampshire went on for well over a year.[67]

- A research report from an investment firm stated that the franchising process delays new entrants into the video services market between eight and 16 months.[68]

- In a filing to the Commission, BellSouth stated that in some instances new entrants must be prepared to spend nearly three years before they can realistically begin providing service.[69] Verizon noted similar delays, including, as described earlier, in Tampa.[70]

- Finally, in its February, 2004 report, the GAO refers to what may be the ultimate horror story, "[a]nother BSP told us that it was unable to obtain a franchise after 2 and ½ years of working with a local franchising authority that was not receptive to competition, and the BSP did not succeed in entering the market."[71]

---

65 Boccucci Declaration at ¶ 21.

66 Declaration of Andy Sarwal of Grande Communications at ¶ 3 ("Sarwal Declaration"), attached hereto as *Attachment D*.

67 McGarty Declaration at ¶ 43.

68 Crandall Paper at 2-3, (citing *Communication Services As RBOCs Video Efforts Falter, Outlook Improves for DBS, Cable*, THE BUCKINGHAM RESEARCH GROUP, (June 13, 2005) at 3.

69 BellSouth Comments at 3 (stating it can take up to 3 years to conclude negotiations).

70 *Comments of Verizon*, MB Docket No. 05-255 (filed Sept. 19, 2005) at 8 (noting delays result from "inertia, arcane or lengthy application procedures, bureaucracy or, in some cases, in attentiveness or unresponsiveness at the LFA level")("Verizon Comments").

71 GAO-04-241 at 21.

The reasons for the delays are many and have almost nothing to do with ROW management.[72] First, the cable franchising process is often geared towards a negotiation between an exclusive provider and the LFA. As such, because there is no need to be concerned about competitors, time is not of the essence. Instead, the LFA's presumption is that the process can move at a snail's pace with extensive discussions and meetings with different layers of government and community groups, just as it did with the incumbent operator.[73] Moreover, in this process, the new entrant is questioned on everything from the type and performance of its network to free service obligations, issues that are alien to all other (non-cable) entrants into the MVS market.

Second, the LFA may lack the means to be sufficiently responsive to process a franchise request in a timely fashion. As observed by the GAO in its February 2004 report:

> Another factor that may cause BSPs to choose not to enter a market is the local government's lack of administrative resources. Specifically, one local official said that the lack of administrative resources to process applications quickly caused some BSPs to withdraw their applications and seek more receptive markets.[74]

---

[72] The Commission has previous experience with reviewing onerous requirements imposed by localities in the franchising process. In the case of the telecommunications industry, after passage of the 1996 Act, competitive carriers seeking to deploy new networks faced franchising delays and additional requirements from franchising authorities. These were often in the form of burdensome application and permit processes or unfettered discretion to approve or deny an agreement. Many of these provisions were eventually struck down as outside the permissible scope of ROW management, but not until after the delays adversely affected competitive telecommunications providers. *See, e.g.*, *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001) (holding that the franchise requirements unrelated to the management of the public ROW and the unfettered discretion of the City to act as the final decision maker were outside the scope of permissible ROW management).

[73] Verizon Comments at 8; *see also* McGarty Declaration at ¶¶ 17-23.

[74] GAO-04-241 Report at 21.

Third, the incumbent provider certainly does not want competition and injects itself into the process, often citing the level-playing-field ("LPF") provision in the state law or even its agreement. Where an incumbent invokes such a provision, the LFA can become virtually paralyzed as it strives to avoid a lawsuit. One result of this concern it that it is common for an LFA to share drafts of the new agreement with the incumbent for its review and comments.[75]

Fourth, the would-be new entrant needs time to react to all of these burdensome obligations. As was noted in the previous section, a new entrant, especially one using a FTTH network, needs to control costs to ensure the venture is financially viable, and the FTTH Council has demonstrated that new entrants withdraw from the process as these costs mount.[76]

In each case, the source of delay is the result of the LFA imposing economic regulations on the new entrant whether as a result of the LFA's present policy choices or, in the case of an LPF provision, because it perceives itself bound to do so. A multiplier effect exacerbates the problems: a new entrant may need to enter multiple markets to obtain the necessary scale to become a viable operator, and in each one or many may face problems with the process in the form of unreasonable delays – whether caused by a lack of resources, incumbent involvement and demands, or negotiating in the face of unreasonable requirements. Establishing a deadline for action by the LFA needs to be one focus of the Commission's relief.

2. *State "Level Playing Field" Laws or Contractual "Parity" Provisions Deter New Entry*

Immediately upon gaining exclusive franchises, cable operators made a concerted effort to protect their potent market position by lobbying states to enact LPF laws. Within a

[75] Boccucci Declaration at ¶¶ 9, 17. *See also,* McGarty Declaration at ¶ 22.

short time, over ten states had enacted them, and even today new legislation on this issue is introduced.[77] In addition, "parity" or "most favored nation" provisions have become a staple of incumbent franchise agreements.[78]

This superficially competitively neutral requirement, however, is actually a death knell for competition because the second and any later cable operator faces a far more risky capital investment than did the incumbent cable operators one or two decades ago. The reason is that such a law or contract provision provides incentives for the incumbent to raise its bid to acquire and maintain the franchise, for example by offering to provide more services to the LFA. For a firm with current market power, this poses little problem since customers have little or no choice and the costs can be spread over a large base. New entrants have neither of these advantages.[79] The addition of new services that any would-be competitor would have to match, by virtue of a LPF provision, simply raises the hurdle to entry and winds up being good insurance for the incumbent.

Economic analysts support the conclusion that second entrants face a greater burden in recovering their investment than did incumbents who operated for an extended period as the exclusive provider of MVS services. Hazlett and Ford state,

---

76 Boccucci Declaration at ¶¶ 13-14. *See also,* McGarty Declaration at ¶ 16.

77 States with LPF laws are: Alabama, California, Connecticut, Florida, Illinois, Kentucky, Minnesota, New Hampshire, Oklahoma, Tennessee and Virginia. *Source,* Thomas W. Hazlett & George S. Ford, *The Fallacy of Regulatory Symmetry: An Economic Analysis of the 'Level Playing Field' in Cable TV Franchising Statutes,* 3 BUSINESS & POLITICS (2001), at Table 1.

78 For additional discussion *see* David P. Kerr, *Local Cable Overbuilder Issues; The Search for a Level Playing Field*, Law Seminars International, available on-line at http://www.watoa.org/level_playing_field.pdf; *see also* Boccucci Declaration at ¶¶ 8, 10; *see further,* Sarwal Declaration at ¶ 6.

79 Sarwal Declaration at ¶ 7.

> [l]abeling nominally symmetric obligations borne by entrants and incumbents as 'equal' burdens ignores the greater likelihood that the residual profits anticipated by the entrant will be insufficient to cover fixed costs, relative to the incumbent that entered without rivals ... [T]he general result of the LPF law is that incumbents and franchise authorities can force entrants to incur sunk costs considerably in excess of what free market conditions would imply.[80]

The harmful effects of level playing field provisions are demonstrated by the experiences of Overbuilders. Knology, for instance, faced an LPF law when it sought to obtain a franchise in Louisville, Kentucky. As Felix Boccucci states,

> [t]his [LPF] provision is more aptly called the 'anti-competition' provision. Its superficial appeal to fairness masks the real intent: to protect the incumbent's market position. No new entrant – without any market share – can be viable if it must undertake the same responsibilities and obligations of an incumbent with market power.[81]

As a result of this provision, Knology's negotiations with the LFA in Louisville, Kentucky lasted far too long and eventually caused it to withdraw from the market.

Andy Sarwal of Grande makes a similar point,

> [t]hey [the LPF provisions] force the new entrant to bear all the same costs and requirements the incumbent accepts, but without having anywhere near the same number of subscribers over which to spread the costs. When incumbents installed their systems, they had a captive market in which any resident or business that wanted cable services would have to take it from the incumbent. New entrants, such as Grande, have to 'win' every customer from the incumbent, either directly or in competition, and have a diminished opportunity to recover the costs of the requirements that had been imposed on the incumbent. For instance, municipalities required us to pay the same amount as the incumbent for such items as PEG and I-Net contributions, letters of credit, bonds, pre-payments, and security deposits. Yet, the incumbent could allocate these costs over 100% of the cable television subscribers or about 60% of the

80 Hazlett & Ford at 24-25.

81 Boccucci Declaration at ¶ 8.

> total potential market, whereas Grande had to do so over a 0% market share when it first entered, and it never enjoyed the incumbent position as the exclusive provider of cable television service.[82]

In the case of the Hanover, New Hampshire application of Merton, the LPF law was particularly invidious. Here the city attorney interpreted the statute to require the imposition on the new entrant of all the requirements in the incumbent's agreement ***plus*** any additional requirements the LFA wanted to impose.[83] Finally, the GAO in its February, 2004 report finds that a LPF law was a barrier to entry: "[o]ne local official told us that the level-playing field law in his state … was a factor in an interested competitive cable company's … retracting a cable application."[84]

These cable LPF laws and contract provisions were based on the argument that if these parity requirements did not apply, the new entrant would have an advantage, operating unburdened by these requirements. Twenty years of history has demonstrated this argument is completely specious. There is not widespread cable overbuilding. In fact, the opposite is true; there is substantial evidence that LPF requirements have harmed new entrants or simply scared off applicants in the first place. In the words of Hazlett and Ford, "[a] faux symmetry in regulation can successfully divert policymaker and administrative processes from promoting competitive entry."[85] The Commission cannot allow that to happen in this proceeding and it should prohibit LPF laws and provisions.

---

82 Sarwal Declaration at ¶ 7.

83 McGarty Declaration at ¶ 38.

84 GAO-04-241 Report at 21.

85 Hazlett & Ford at 43.

3. *Build-out Requirements Prevent the Deployment of New Networks*

When LFAs awarded exclusive franchises for cable systems, they had an interest in ensuring most if not all of the citizens received service. Frank Greif, Director of the Office of Communications in Seattle, made this point in his Senate testimony on the original Cable Act:

> As the franchisors of cable systems, local governments have a responsibility to ensure that cable operators do not abuse their position as gatekeepers to cable systems by arbitrarily excluding potential users of the monopoly system … [T]he public should have an equal opportunity for access to the monopoly distribution system it has permitted to use the public's property. The construction and operation of a natural monopoly under a franchise designed to protect the public's interest carries with it certain regulatory responsibility.[86]

The initial cable operators generally did not object to this citywide build-out requirement since they were the only entrant in the MVS market and could gain sufficient market share over which to spread these very substantial upfront costs. Thus, as a part of the franchise agreement, LFAs usually required providers to build-out their network throughout the franchising area – often with exceptions for very low density areas – based on a time schedule established by the LFA.

It is obvious from Mr. Greif's statement that the build-out requirement is inextricably intertwined with a monopoly cable system. That makes perfect sense. Building out in a "greenfield" market, where there is no MVS competition, is a luxury few businesses ever experience and should be offset by a regulatory requirement ensuring all households receive service. Today's new entrants have no such luxury. Instead, they operate in far different and far

[86] Statement of Frank Greif, Director, Mayor's Office of Cable Communications, Seattle, WA, before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, U.S. Senate, 98th Cong. 1st Sess., Hearings on the Cable Telecommunications Act of 1983 (Feb. 17, 1983).

more challenging marketplace. In such an environment, the logic supporting extensive LFA-imposed build-out requirements is completely undermined.[87]

Some LFA representatives recognize that "[n]othing in franchising or current federal law requires a new video entrant to deploy to an entire community immediately."[88] Yet, despite significant changes in the marketplace, LFAs generally seek to impose the same – and in some instances more burdensome – build-out requirements that the incumbent provider undertook. In such circumstances, new entrants cannot make the "numbers" work. [89]

Just like the incumbent, a new entrant must expend enormous amounts of capital upfront, in sunk facilities, before being able to offer service. Unlike the incumbent, it must take customers from a competitor, which is a slow and difficult process.[90] Therefore, the new entrant

---

87 Boccucci Declaration at ¶ 10.

88 Statement of the Honorable Kenneth Fellman, *How Internet Protocol-Enabled Services Are Changing the Face of Communications; A View from Government Officials: Hearing Before the House Comm. on Energy and Commerce, and the Subcomm. on Telecomm., and the Internet*, 109th Cong. 1st Sess. (April 2005) at 15 ("Fellman Statement").

89 *See*, George Ford *et al.*, *The Consumer Welfare Cost of Cable "Build-out" Rules*, PHOENIX CENTER POLICY PAPER NO. 22 (July 2005) at 21, which states, "*a build-out rule, in fact, creates a tremendous disincentive for a new entrant to invest and is likely to result in entire communities being bypassed.* Our theoretical model shows that a build-out rule will *always* increase costs and reduce profits of the prospective entrant, and our empirical simulations show that the net result is substantially less deployment. In other words, a build-out rule designed to prevent 'economic red-lining' *within a community* essentially imposes a different form of 'economic red-lining' *between communities*. Further, if entry is deterred by the build-out rule, consumers are denied a price break that they would have otherwise received in the absence of the rule" (*emphasis supplied*).

90 Verizon is expected to penetrate only about 17% of MVS households in the region where it is the incumbent LEC by 2010. *Telco TV Update – Full Steam Ahead*, UBS INVESTMENT RESEARCH at 4 (Sept. 22, 2005). *See also*, Northwestern University Media Management Center, *Media Info Center*, available on line at www.mediainfocenter.org/television/size/cable_vcr.asp (July 13, 2005) (noting that as of mid-year 2005, cable operators' penetration rate nationwide was 67.5%)

cannot spread these costs relatively quickly over a large base, making entry a much riskier proposition.[91]

Andy Sarwal of Grande Communications agrees, emphasizing this burden is even greater for a new entrant because cities have grown since the incumbent first deployed its cable system, the requirements are often linked to upgraded systems, and the penalties are excessive,

> Grande in practically all cases had to agree … to the same 'build-out' requirements as the incumbent, even though, unlike the incumbent, it did not begin by having an exclusive agreement, and most of the incumbents' requirements were either when the cities were much smaller or were for upgrades of the incumbent system that was already ubiquitous in the market. The potential penalties imposed on Grande for failure to meet these requirements also were often excessive. For instance, in one market, they were $2,000 per day.[92]

In the case of current telecommunications providers in a market, it is rare that their infrastructure precisely overlaps a franchise territory. More often it overlaps pieces of many franchise areas (which is itself a handicap). It is because of their existing infrastructure that incumbent LECs likely have the best business case to enter rapidly and deploy next-generation networks. The business case, however, becomes much more dubious if they are required to meet build-out requirements for areas where they have no existing plant. As Verizon has noted, "to require the new entrant to build-out and serve an entire franchise area on an expedited basis" is illogical for competitive deployment.[93] Likewise, to require build-out

---

91 *See,* Boccucci Declaration at ¶ 10; *see also Comments of the Broadcast Service Providers Association*, MB Docket No. 05-255 at 19 (Sept. 19, 2005) (noting that build-out requirements are anticompetitive because "the incumbent has had decades to build, upgrade and expand its network with limited or no competition").

92 Sarwal Declaration at ¶ 8.

93 Verizon Comments at 9.

requirements to be based on franchise areas that do not correspond to deployment targets is as much a barrier as requiring full coverage.[94]

Looking at a broad range of providers, the GAO found new entrants, when faced with an unworkable build-out requirement, often withdraw from the process, eliminating potential consumer gains from competition.[95] As stated earlier, that was the case in Texas for GVCS, and it did not enter the market until it obtained a state-issued franchise where it could designate the areas to be built.[96]

Because build-out requirements slow deployment of new networks, consumers are harmed. For this reason, the Commission found that build out requirements were barriers to entry in the competitive telecommunications market and, pursuant to Section 253, were preempted.[97] The same is true for new entrants into the cable market. Without a build-out requirement, there is a far greater likelihood that next-generation networks will be deployed,

---

94 George S. Ford *et al*, *The Impact of Video Service Regulation on the Construction of Broadband Networks to Low-Income Households*, PHOENIX CENTER POLICY PAPER NO. 23 (Sept. 2005) at 22 (forcing build-out on existing cable franchise areas may raise costs by forcing new entrants to expand beyond existing markets); *see also,* Verizon Comments at 11 (build-out areas with no correlation to telephone service areas creates barriers to entry).

95 GAO-04-241 Report at 25 (noting build-out schedules based on the incumbent's requirements are deterrents to entering a specific market). *See*, also, George S. Ford *et al*, PHOENIX CENTER POLICY PAPER NO. 23 at 21 (noting build-out requirements serve as barriers to entry for new entrants who seek statewide deployment).

96 Mnick Declaration at ¶¶ 6-7.

97 *See Public Utilities Commission of Texas*, CCB Docket No. 96-13, Memorandum Opinion and Order, 13 FCC Rcd 3460, ¶ 13 (1997) (noting that "build-out requirements are of central importance to competitive entry because these requirements impact the threshold question of whether a potential competitor will enter the local exchange market at all").

providing consumers with choice and reducing prices.[98] Accordingly, the Commission should eliminate these types of barriers and provide real benefits to consumers.[99]

4. *Optional Franchise Requirements and Non-Video Requirements Raise the Cost of Entry for New Entrants*

When the cable industry sought legislation some 20 years ago to rein in the power of the LFAs, it put into the record a number of examples of excessive demands: funds for a hospital, planting trees, free service to certain residents, and very high franchise fees.[100] The 1984 and 1992 Cable Acts have helped curb some of these abuses by expressly identifying a limited range of items that need be negotiated for a franchise agreement. The creativity of LFAs in stretching the limits of law – sometimes beyond its boundaries – is most impressive. Often times the LFA views the franchising process as "an opportunity to garner from a potential new video entrant concessions that are in no way related to video services for the rational of requiring franchises."[101] Here are some recent examples justified under the provision of the Cable Act allowing LFAs to require PEG channels on a cable system:

- The Corpus Christi LFA demanded an upfront $200,000 payment for PEG channels from Grande.[102]
- In Louisville, Kentucky, the franchise agreement required Knology to make a PEG grant of $266,000 at the time the franchise was awarded and the overall amount due over the 15 year term was $1.9 million.[103]

---

98 George S. Ford *et al*, PHOENIX CENTER POLICY PAPER NO. 22 at 9.

99 It is important to note that the build-out provision in Section 621(a)(4)(A) is separate and distinct from the provision prohibiting against "redlining"(Section 621(a)(3)). The FTTH Council believes, if presented with evidence of "redlining," the LFA has an obligation under the law to address it immediately.

100 Wheeler Statement.

101 Verizon Comments at 12.

102 Sarwal Declaration at ¶ 9.

103 Boccucci Declaration at ¶ 22.

- In Sudbury, Massachusetts, even though the town already has studio facilities for its government access channels and an I-Net, Verizon is being required to pay approximately $100,000 per year for these activities – and the town will decide later how these funds should be expended. This is in addition to a one-time grant of $86,000 for capital equipment.[104]

- In Tampa, FL, the LFA presented Verizon with "$13M wish list, including money for an emergency communications network, digital editing equipment, and video cameras to film a math-tutoring program for kids."[105]

As demonstrated above, LFAs have become particularly ingenious in using the PEG channel requirement in the law. They frequently require new entrants to install a second I-Net for the community even though the incumbent cable operator's facilities are sufficient. In fact, one LFA requested that Verizon construct an additional I-Net for the LFA at a cost of $4.9 million (or simply pay the cash equivalent).[106] Other times, they require new entrants to subsidize the already installed I-Net (or some other activity) through payments on a per subscriber basis to the incumbent cable provider even though these payments are not related to the cost of the activity.[107] Usually, these grants are not considered an advance payment of franchise fees or a deduction from the provider's gross revenues. They are simply required for the franchise agreement to be completed.

In addition to these PEG related items, LFAs are imposing other requirements not linked to the provision of video services, which only serve to raise the cost of entry. For instance,

---

104 Stacey Hart, "Verizon Close to Cable Deal: Draft license agreement would give Sudbury extra $100k, local programs," METROWEST DAILY NEWS (Jan. 22, 2006).

105 Searcey at A1.

106 Verizon Comments at 13.

- One county required Verizon to connect all the traffic signals with fiber, allow parking for the library at Verizon's facility, build a mobile repeater at a municipal facility, and provide municipal employees with free mobile service. In addition, Verizon has also been obligated by one LFA to pay a $250,000 one-time "acceptance fee" when it signed its agreement, and a $50,000 application fee.[108]

- An October, 2005 Wall Street Journal article cites a variety of other extraneous demands made by LFAs on Verizon: "seed money for wildflowers and a video hookup for Christmas celebrations" (Massapequa Park, New York); "free television for every house of worship and a 10% video discount for all senior citizens" (Holliston, Massachusetts); and, "high-speed Internet for sewage facilities and junk yards, flower baskets for light poles, cameras mounted on stop lights and Internet connections for poor elementary students."[109]

- In San Antonio, Texas, Grande was required to prepay $1 million in franchise fees, which took the company five years to draw down. The LFA also required Grande to fund a $50,000 scholarship with an additional $7,200 to be contributed each year.[110]

Not only are negotiations prolonged while these items are being discussed, they raise the cost of entry. New entrants agree to them because they have no alternative.[111] Litigation is costly and would further delay getting into business. The Commission needs to limit their use, and restrict LFAs to requiring only what the Communications Act allows and is consistent with the development of competitive alternatives to cable.

5. *Excessive Franchise Fees Hinder Deployment by New Entrants*

The 1984 Cable Act limited the ability of the LFA to impose franchise fees greater than 5% of the cable operator's gross revenues derived from operating the cable system

---

107 *What Key Franchise Issues Arise in Negotiations with Overbuilders?* MILLER & VAN EATON, P.L.L.C, available on line at http://millervaneaton.com/pastfeatures/feature_key_franchise.html.

108 Verizon Comments at 12.

109 Searcey at A1.

110 Sarwal Declaration at ¶ 9.

within the community – minus specific costs and items.[112] When Congress restricted the amount the LFA could charge for the franchise fee, it did so for one reason: it did not want the LFA to appropriate excessive funds from the cable operators who were entrenched in the market and allow the imposition of franchise fees to hinder the development of the cable industry.[113] It is common practice for LFAs to impose the full five percent obligation on the incumbent cable operator for the privilege of a franchise agreement. LFAs continue to assert that they are permitted to impose a revenue-based tax on video service providers premised on their need to protect the limited resources of the public ROW.[114] With the presence of competition, the imposition of a franchise fee based on five percent of the gross revenues of new entrants – as opposed to the actual and reasonable costs of use – forestalls competition.

As is the case in the telecommunications industry, any fees applied to providers of video services should directly relate to the actual costs incurred by the LFA for managing the public ROW and the actual costs associated with ROW use. The Commission should ensure that while franchise fees may not exceed 5% of a provider's cable-related revenues, they are limited to fees that recover the LFA's administrative costs for managing and overseeing use of the public ROW. For example, LFAs should be entitled to recover costs associated with excavations, inspections, implementation/administration of the permitting process, and other matters

---

111 *Id.* at ¶ 10.

112 47 U.S.C. § 542.

113 *See Cable Television Report and Order*, 36 F.C.C. 2d. 143, *recon.*, 36 F.C.C. 2d. 326 (1972).

114 Fellman Statement at 6 (noting that LFAs "ensure that the public's assets are not wasted by charging reasonable compensation for the use of the right-of-way").

incidental to ROW usage.[115] The Commission should limit the LFA's ability to impose franchise fees on a cable providers to be commensurate with the other limitations imposed herein. Fees that bear no relation to costs imposed for use of the municipal ROW, or other requirements permissible under the statute, drastically increase the costs of deploying new networks, forcing new entrants to deploy only in limited areas, affecting both cable competition and the deployment of advanced services.

Finally, the Commission should not presume that limiting fees in the manner proposed here will cause a decrease in revenues for LFAs. In a recent Phoenix Center Policy Bulletin, the authors constructed a model of competitive entry by local telephone companies.[116] They found "that if wireline, local telephone company entry into the multichannel video industry is successful, then gross taxable revenues from the wireline multichannel video industry will increase by 30%."[117] This is due to demand stimulation from competition. As a result, they calculate that "a reduction in the franchise fee cap from 5% to 3.7% would be revenue neutral."[118]

B. BARRIERS IN THE FRANCHISING PROCESS CONFLICT WITH PRO-COMPETITION POLICY AND SECTION 706 BROADBAND DEPLOYMENT LEGAL REQUIREMENTS

Of the barriers just described, each hinders new entry into the MVS and converged services markets. When several of these barriers are present simultaneously, they

---

115 Section 622(g)(2)(D) makes charges incidental to the awarding or enforcing the franchise separate from the franchise fee. *See* 47 U.S.C. § 542(g)(2)(D).

116 George S. Ford & Thomas M. Koutsky, *Franchise Fee Revenues After Video Competition: The "Competition Dividend" for Local Governments*, PHOENIX CENTER POLICY BULLETIN NO. 12 (Nov. 2005).

117 Ford & Koutsky, PHOENIX CENTER POLICY BULLETIN NO. 12 at 1.

118 *Id.*

often form a virtually insuperable hurdle to obtaining a franchise. When each of the thousands of franchises is considered, the result is devastating for national communications policy.

By raising significantly the cost of entry, the barriers in the franchise process violate both the letter and spirit of Congressional objectives to provide consumers with greater MVS competition. In turn, because of the lack of competition, rates for MVS are above competitive levels, and the provision of services is more limited. The Commission has an obligation to remedy such a direct violation of the law.

Not only does the typical franchising process today conflict with Congressional objectives of giving consumers choices of cable television providers, it also frustrates another national goal detailed by Congress in the Communications Act: the promotion of advanced (high-speed broadband) services to all Americans. Section 706 requires the Commission to encourage the deployment of broadband networks in a reasonable and timely fashion and directs the Commission to remove barriers that stand in the way of this goal. The barriers in the franchise process more than fit this description. As demonstrated above, when the franchising process takes too long, potential next-generation network providers lose crucial time to competitors and in obtaining important revenues. When the process results in increased requirements, the cost rises, often prohibitively.

FTTH and other next-generation broadband networks are based on state-of-the-art technologies. The costs of the initial deployment are higher than traditional networks, and providers can only expect a sufficient return on their investment by offering the triple-play of converged services, and, of this bundle, cable service in the form of multichannel, high-definition, and on-demand video offerings is the key. These offerings must be present if the triple-play providers are to generate sufficient revenues to pay for the large, upfront sunk capital costs. In other words, no one will build these next-generation networks without being able to provide cable service, which means that obtaining the cable franchise is the critical first step.

What then are the effects of various barriers on FTTH deployment? According to UBS Investment Research ("UBS"), two barriers have a particularly dramatic effect: building-out to the entire franchise area, and requiring that fiber cable be buried. UBS states that Verizon's FTTH deployment cannot be economically viable with build-out requirements that do not match its telecommunications footprint.[119] This is because: by replacing copper telephone plant, FTTH deployments in-territory achieve significant cost savings; in-territory customer retention rates improve when the triple-play services are offered; and large expenses are incurred to establish relations with new, out-of-territory customers.[120] As for burying cable, UBS calculates that such a requirement would increase FTTH costs by about 33% – from $1,515 per home served to $2,220.[121] If this requirement were imposed throughout Verizon's entire territory, it has the potential to raise total capital expended by many billions of dollars and increase the company's EBITDA losses.[122]

UBS also believes that the longer it takes Verizon to deploy FTTH the greater the advantage for the incumbent cable operator in the converged services market:

> [a] slower rollout of video service will increase the head start the cable industry has over the phone companies in providing the triple play of services – voice, video, and data – on one platform. This larger headstart will likely lead to increased longer-term residential

---

119 *Franchise Fights Likely to Delay Video Competition*, UBS INVESTMENT RESEARCH, at 3-4 (May 2, 2005) *("Franchise Fights*").

120 *Franchise Fights* at 4.

121 *Q-Series: TelcoTV – The Best Defense?* UBS INVESTMENT RESEARCH, (PowerPoint) at 7 (Dec. 1, 2004).

122 UBS Investment Research, *Q-Series: TelcoTV – The Best Defense?* UBS INVESTMENT RESEARCH, (Full Report) at 4 (Dec. 1, 2004).

> market share for the MSOs and greater access line losses for incumbent local exchange carriers.[123]

These accelerated losses to cable impair the economics of FTTH because: (1) the base of existing incumbent LEC voice customers available to cross-sell video is diminished; and, (2) the pool of potential new customers is limited since many will have already signed up for cable's triple-play and their churn rate is historically lower than average. Thus, there is proof that barriers in the franchise process harm reasonable and timely FTTH broadband deployment. These types of barriers clearly violate Section 706, and the Commission, under the language of that provision, is obligated to remove them.

V. THE COMMISSION HAS JURISDICTION TO ADOPT, *AND SHOULD ADOPT*, REGULATIONS GOVERNING THE CABLE FRANCHISING PROCESS

Congress' central objective when adopting the 1984 Cable Act was to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."[124] In its 1990 Report on Cable TV, the Commission determined that competition in the cable industry would be best promoted through the granting of multiple cable franchises without any unreasonable refusals; therefore, the Commission sought legislation to that effect.[125] Congress registered its concurrence in 1992 by amending Section 621 of the Communications Act to prevent LFAs from unreasonably denying competing cable franchises. Unfortunately, the objectives of Section 621 have not been achieved.

---

123 *Franchise Fights* at 2.

124 47 U.S.C. § 521(6).

125 *See e.g., 1990 Report on Cable TV.*

As the discussion in previous sections reveals, an increasing number of fiber-based providers seek to provide competitive cable service but are impeded in their abilities to do so as a result of unreasonable delays in processing requests for additional franchise and by the imposition of unreasonable requirements. This state of affairs will continue in the absence of regulations by the Commission addressing the limits placed on LFAs when would-be cable operators seek a franchise in competition with the incumbent. The Commission has the authority to adopt regulations implementing Section 621 and should now take concrete steps to further competition in the provision of fiber-based cable and video services and achieve Congress' objectives. Specifically, the Commission should ensure regulation in the cable industry is kept to a minimum and applied uniformly nationwide consistent with the Communications Act by adopting clear directives specifying what constitutes an unreasonable refusal by an LFA "to award an additional competitive franchise,"[126] so that "potential competitors who are ready and able to provide service"[127] may do so without unwarranted encumbrances or delay.

A. CONGRESS CONTEMPLATED THE LOCAL CABLE FRANCHISING PROCESS WOULD OPERATE WITHIN A NATIONAL FRAMEWORK

In adopting the 1984 Cable Act, Congress intended the local cable franchising process conducted by LFAs would be subject to a national framework that promoted cable competition and sought to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems."[128] Congress made clear that it was

---

126 47 U.S.C. § 541(a)(1).

127 *Video Franchising NPRM* ¶ 3 (citing *1990 Report on Cable TV* at ¶ 141).

128 47 U.S.C. § 521(3) (designating the establishing of "guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems" as a national communications policy).

"establish[ing] a *national* policy concerning cable communications" by "establish[ing] franchise procedures and standards" within the Communications Act.[129]

Specifically, to that end, Section 621(a)(1) of the Communications Act enumerates Congressionally-mandated restrictions on every LFA's authority during the franchising process. Under the statute, LFAs are limited in the conditions that they may place on a franchisee when granting an application:

- LFAs may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise;[130]
- LFAs must allow franchisees a reasonable time to become capable of providing service to all households in the area covered by the franchise;[131]
- LFAs are free to require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, and financial support;[132]
- LFAs are able to require adequate assurance that the cable operator has financial, technical, and legal qualifications to provide cable service;[133]
- The only telecommunications services or facilities an LFA may require a cable operator to provide are institutional networks as a condition of a grant, transfer, or renewal of a franchise;[134]
- LFAs must assure that access to cable service is not denied to any group of potential residential cable customers because of the income of the local area in which the residents reside.[135]

129 47 U.S.C. § 521(1) (*emphasis supplied*) and (2).

130 47 U.S.C. § 541(a)(1).

131 47 U.S.C. § 541(a)(4)(A).

132 47 U.S.C. § 541(a)(4)(B).

133 47 U.S.C. § 541(a)(4)(C).

134 47 U.S.C. § 541(b)(3)(D).

135 47 U.S.C. § 541(a)(3).

Thus, while Congress may have envisioned that the primary responsibility for administering the franchising process would be at the state or local level, the federal oversight established by the 1984 and 1992 amendments contemplates a uniform national policy as to how cable franchise applicants and franchisees were being treated. The Commission noted that "the legislative history makes plan [that] the purpose of this abridgement of local government authority [in Section 621(a)(1)] was to "promote greater cable competition."[136] A large measure of national uniformity was written into the Act when Congress provided that the legal requirements of any LFAs (and States) and the provisions of any cable franchise "are preempted and superceded" which are inconsistent with the Act.[137] Similarly, the authority of LFAs (or States) regarding matters of public health, safety, and welfare is unaffected only if that authority is exercised consistent with the provisions of Title VI of the Communications Act.[138]

The legislative history further indicates that Congress did not intend for LFAs to have the unfettered right to conduct the franchising process in any way it chooses.[139] LFAs must comply with the requirements of the Communications Act, regardless of the local nature of the cable franchise itself. "[I]f [the franchising] process is to further the purposes of this legislation,

---

136 *Video Franchising NPRM* ¶ 4 (citing to S. REP. NO. 102-92 at 47 (1991)).

137 47 U.S.C. § 541(c).

138 47 U.S.C. § 541(a).

139 *Video Franchising NPRM* at ¶ 3 n.18 (citing, H.R. REP. NO. 98-934 at 19 (1984) "[The 1984 Cable Communications Act] establishes a national policy that clarifies the current system of local, state and federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process").

the provisions of these franchises, and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform federal standards."[140]

B. THE COMMISSION HAS AUTHORITY TO ADOPT REGULATIONS IMPLEMENTING SECTION 621(a)(1)

The Commission has the authority to promote the uniform standard envisioned by Congress by adopting regulations interpreting the Communications Act that LFAs must follow when conducting the franchising processes. Specifically, the Commission may adopt regulations designed to ensure that LFAs do "not unreasonably refuse to award an additional competitive franchise."[141] Although the Communications Act does not expressly state that the Commission shall adopt regulations implementing Section 621(a)(1), there are several generally applicable sources for that authority found in Sections 201(b) and 4(i) of the Communications Act and Section 706 of the 1996 Act.

1. *The Commission Has General Rulemaking Authority Under Section 201(b)*

Under Section 201 of the Communications Act, the Commission "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the Communications] Act."[142] "Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act [through] § 151, and to 'prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions' of the Act

---

140 *See, e.g.*, H.R. REP. NO. 98-934, at 24 (1984).

141 47 U.S.C. § 541(a)(1).

142 47 U.S.C. § 201(b).

[through] § 201(b)," and the Supreme Court has recognized that "these provisions give the Commission the authority to promulgate binding legal rules."[143]

As noted above, Congress expressly found that the public interest is best served by promoting competition in the cable industry through timely and efficient granting of competing cable franchises and incorporated this principle into general restrictions placed on LFAs in the franchising process.[144] Section 201 authorizes the Commission to adopt binding rules articulating the requirements of Section 621(a)(1), as well as those ancillary requirements in Title VI such as build-out requirements, provision of PEG Channels, and others. Specifically, the Commission may adopt rules ensuring that franchise application processing times are reasonable and that LFAs do not impose burdensome requirements on franchisees in a manner inconsistent with the Act and Congress' objectives so as thwart competition in the video marketplace.

Asserting its authority under Section 201 to implement Section 621(a)(1) and related provisioning through regulations would not be novel. After the passage of the 1996 Act, which is incorporated into the Communications Act, the Commission promulgated rules to implement interconnection obligations under Sections 251 and 252. While some areas of the regulations the FCC adopted to implement Sections 251 and 252 were specifically contemplated by Congress, the Commission also adopted rules in areas not expressly identified by Congress within the 1996 Act, for example those governing the pricing of incumbent LECs' unbundled network elements ("UNEs"). The 1996 Act gives state commissions the job of arbitrating, reviewing, and approving interconnection agreements and incumbent LEC prices for

---

143 *Nat'l Cable & Telecomm, Ass'n v. Brand X Internet Servs.*, 125 S.Ct. 2688, 2699 (2005) (citing *AT&T Corp. v. Iowa Utils. Bd*., 525 U.S. 366, 377-378 (1999)).

interconnection and UNEs. Many incumbent LECs challenged the Commission's authority to adopt implementing regulations that the 1996 Act had not expressly authorized. However, the Supreme Court rejected those challenges to Commission jurisdiction.[145] In upholding the Commission's jurisdiction to adopt these regulations implementing the local competition provisions of the 1996 Act that the states had certain authority to implement through their duties to arbitrate, review, and approve interconnection agreements, the Supreme Court found:

> Since Congress expressly directed that the 1996 [Telecommunications] Act be inserted into the Communications Act of 1934, and since [§ 201 of] the 1934 Act already provides that the FCC "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," the FCC's rulemaking authority extends to implementation of §§ 251 and 252. Section 152(b) of the Communications Act, which provides that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to … intrastate communications service … " does not change this conclusion because the 1996 Act clearly applies to intrastate matters … We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the "provisions of this Act," which include §§ 251 and 252, added by the Telecommunications Act of 1996.[146]

Likewise, Congress was aware of the grant of authority to the Commission in Section 201(b) when it incorporated the 1984 Cable Act and later cable-related amendments within the Communications Act. Accordingly, the Commission maintains statutory authority under Section 201(b) to adopt implementing regulations for Section 621. Stated simply, as the Supreme Court held in *Iowa Utilities Board*, "[Section] 201(b) explicitly gives the FCC

---

144 47 U.S.C. § 541(a).

145 *See e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

146 *Id.* at 378 (citing 47 U.S.C. § 201(b)).

jurisdiction to make rules governing matters to which the 1996 Act applies."[147] This is equally true for the Communications Act's amendments to the cable provisions as it is to Title II.

2. *The Commission Has General Rulemaking Authority Under Section 4(i)*

Section 4(i) of the Communications Act grants the Commission authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[148] The Commission has consistently invoked its authority under Section 4(i) in ordering clauses when it adopted regulations interpreting the Communications Act in various contexts, and its authority to regulate the cable industry under this provision has been upheld.[149] As the Supreme Court affirmed in the recent *Brand X* decision, "Congress has delegated to the Commission the authority to 'execute and enforce' the Communications Act [through] § 151," "provisions which give the Commission the authority to promulgate binding legal rules."[150] Furthermore, Section 4(i) has been found to bestow broad authority to the Commission, "empower[ing] the Commission to deal with the unforeseen …[even if it that means straying a little way beyond the apparent boundaries of the Communications Act] to the extent necessary to regulate effectively those matters already within the boundaries."[151] Given the intent of Congress to establish a national framework for local franchising within the boundaries of the Communications Act and

---

147 *Id.* at 380.

148 47 U.S.C. § 154(i).

149 *See S.W. Cable Co. v. US*, 378 F.2d 118, 121 (7th Cir. 1967) (upholding the Commission's authority to regulate the cable industry under Section 4(i), but finding that the Commission had exceeded its authority because its actions there were not consistent with the Communications Act).

150 *Brand X*, 125 S.Ct. at 2699.

the Commission's duty to implement that framework, the Commission has clear authority to regulate the details of the local franchising process.

3. *The Commission Has General Rulemaking Authority Under Section 706 of the 1996 Act*

Finally, the Commission can also find authority in Section 706 of the 1996 Act to support adoption of federal regulations implementing Section 621 and related provisions. Under Section 706, the Commission is charged with "encourag[ing] the deployment on a *reasonable* and *timely* basis of advanced telecommunications capability to all Americans … *by utilizing* … *regulating methods* that remove barriers to infrastructure investment."[152] The provision of competitive cable service is closely linked to the provision of advanced services. Competitive cable providers typically invest in fiber infrastructure that allows them to provide, not only video service, but also internet access services as well as advanced voice and other data telecommunications services. Unwarranted delays and burdensome requirements imposed as conditions of obtaining cable franchises result in significant barriers to infrastructure investment for advanced services, and in turn interfere with the reasonable and timely deployment of advanced telecommunications capability to all Americans. Thus, in these circumstances, Section 706 of the 1996 Act compels the Commission to act by "utilizing … regulating methods" to promote the development of advanced telecommunications capabilities by adopting rules that interpret and govern LFAs consideration of applications for additional local franchises consistent with Section 621(a)(1) and the other limitations affecting the franchising process inserted by Congress into Title VI.

---

[151] *New England Tel. & Tel., et al., v. FCC*, 826 F. 2d 1001, 1108 (DC Cir. 1987), *cert. denied* 109 S.Ct. 1942 (1989) (quoting *N. Am. Telecomm Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985).

C. THE COMMISSION HAS THE AUTHORITY TO PREEMPT INCONSISTENT STATE AND LOCAL FRANCHISING ACTIONS

As noted above, an LFA's discretionary authority is not unfettered under the Communications Act. Congress included multiple provisions that specifically guide and restrain the franchising process. While Section 636 provides that the authority of State and local governments to regulate matters of public health, safety, and welfare, and that of States to regulate cable services, is unaffected, Congress also provided that such authority is limited to exercises of power consistent with Title VI.[153] Section 624 echoes this by prohibiting any LFA from "regulat[ing] the services, facilities, and equipment provided by a cable operator except to the extent consistent with [Title VI]" or from "impos[ing] requirements regarding the provision or content of cable services, except as expressly provided in [Title VI]."[154] Indeed, except to a limited extent where franchises were in place when the 1984 Cable Act took effect, Congress provided that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded."[155]

While Congress did not intend the Commission to have exclusive jurisdiction over cable regulation, Sections 624 and 636, both individually and jointly, demonstrate Congress' intent that Title VI, *including regulations adopted by the Commission,* would establish national policies and procedures for providing cable services throughout the U.S. In this way, Congress hoped to ensure some uniformity in the franchising processes across the various

---

152 47 U.S.C. § 157 note (*emphases supplied*).

153 47 U.S.C. § 556(a) and (b).

154 47 U.S.C. § 544(a) and (f)(1).

155 47 U.S.C. § 556(c).

localities. The fact that Congress has specifically reserved a role for LFAs in administering the cable franchising process does not interfere with the preemptive power of federal law, including any Commission regulations promulgated under Sections 201(b), 4(i) of the Communications Act or Section 706 of the 1996 Act.[156]

In a prior interpretation of the Communications Act, the Supreme Court identified the specific circumstances where it would find that a federal act preempts state authority in the same area.[157] In *Louisiana Public Service Commission*, the Supreme Court notes

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to preempt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law,[158] when there is outright or actual conflict between federal and state law,[159] where compliance with both federal and state law is in effect physically impossible,[160] where there is implicit in federal law a barrier to state regulation,[161] where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law,[162] or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.[163]

Thus, preemption occurs, for example, where Congress expresses a clear intent to preempt state law, intended to occupy the field, where state law directly conflicts with federal law, or where

---

156 *See City of New York v. FCC*, 486 U.S. 57, 62 (1988). This is no different from the situation under Title II where the states have important roles in arbitrating and approving interconnection agreements, but the Commission, under Section 201, has adopted regulations to guide the process.

157 *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-369 (1986).

158 *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977).

159 *Free v. Bland*, 369 U.S. 663 (1962).

160 *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

161 *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85 (1983).

162 *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947).

163 *Hines v. Davidowitz,* 312 U.S. 52 (1941).

state law substantially frustrates the purposes of federal law. All of these circumstances are present in this case.

First, as noted above, in Section 636(c), the Congress expressed a clear intent to preempt state and local franchise authority cable regulation when it is inconsistent with the Communications Act. Regulations adopted by the Commission pursuant to its authority under the Communications Act as described above, including Sections 4(i), 201(b) of the Communications Act and Section 706 of the 1996 Act, have the same status as federal law as the statutory provisions those regulations implement, in this case Title VI.[164] Consequently, under Section 636(c), the regulations advocated in these comments and being considered by the Commission in this docket would preempt and supersede both inconsistent State and local provisions regarding the franchising process and inconsistent provisions within new franchises.

Second, Congress clearly occupied the field regarding the franchising process by specifying what LFAs may and may not consider and require during the franchising process. As discussed above, Congress expressly enumerated restrictions to the scope of permissible action by an LFA during the franchising process – prohibiting exclusive franchises and unreasonable refusals to award competitive franchises,[165] entitling franchisees a reasonable time to begin offering to all households in the area covered by the franchise,[166] and prohibiting franchise requirements to provide any telecommunications services or facilities other than institutional

164 *See e.g., City of New York v. FCC,* 486 U.S. at 62 (noting that the Supremacy Clause creates preemption of state laws that conflict with federal laws, including FCC regulations adopted pursuant to Communications Act).

165 *See e.g.,* 47 U.S.C. § 541(a) and Section V.A. *supra.*

166 *Id.* § 541(a)(4)(A).

networks.[167] Although LFAs do maintain some limited discretion in the franchise process,[168] "Congress has made its intent regarding the preemptive effect of Title VI clear:"[169] any provisions of cable franchises that are inconsistent with the Act "are preempted and superceded."[170]

Third, where the Commission promulgates regulations implementing the Communications Act, state and local law is prohibited where it is inconsistent with those regulations. "Federal preemption is premised on the Supremacy Clause and manifestation of Congressional intent to exclude state law."[171] As "federal regulations have no less preemptive effect than federal statutes," the Commission has the power to preempt local ordinances that conflict with federal policies.[172] As discussed above, the Commission has clear authority to adopt binding rules under Sections 201(b) and 4(i) interpreting the scope of the LFAs' authority under Title VI. Under the *Chevron* doctrine, deference must be given to the Commission's interpretation of the Communications Act and preempt conflicting state or local requirements where its interpretations are supported by the language of the Act.[173] As such, LFAs must adhere

---

167 *Id.* § 541(b)(3)(D).

168 *See, e.g.*. 47 U.S.C. §§ 541(a)(4)(B) and (C).

169 *Qwest Broadband Servs, Inc v. City of Boulder*, 151 F. Supp. 2d 1236, 1240 (Colorado 2001).

170 47 U.S.C. § 541(c).

171 *Bulchis v. City of Edmonds*, 671 F. Supp. 1270, 1273 (W.D. Wash. 1987) (citing *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co*., 450 U.S. 311, 317 (1981)).

172 *Macmillan v. City of Rocky River*, 748 F. Supp. 1241, 1246 (N.D. Ohio 1990) (citing *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153, (1982)).

173 *Chevron U.S.A. v. Nat'l Resources Defense Council, Inc.* 467 U.S. 837 (1984). *See also Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 333-339 (2002); *Macmillan v. City of Rocky River*, 748 F. Supp. 1241, 1246 (N.D. Ohio 1990) (finding a

. . .*Continued*

to the federal regulations interpreting and implementing Section 621(a), even if such action conflicts with state or local regulations.

Fourth, the Commission may adopt regulations preempting state and federal laws that frustrate the purposes of federal law. Here, the objectives of Congress in passing Title VI, as amended by the 1984 and 1992 amendments, are clear:

- establish a national policy concerning cable communications;
- establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
- establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
- assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
- establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this title; and
- promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.[174]

The Commission can regulate to advance those purposes in the face of contrary state or local law and preempt state and local provisions that frustrate those purposes.

Commission regulation adopted under Section 4(i) authority preempted implementation of a certain local ordinance).

[174] 47 U.S.C. § 521.

VI. THE RULES ADVOCATED BY THE FTTH COUNCIL WOULD BE ENFORCEABLE IN FEDERAL AND STATE COURTS

The regulations the FTTH Council urges the Commission to adopt would be enforceable through the federal or state courts. Section 635 of the Communications Act provides that "any cable operator adversely affected by any final determination made by a franchising authority under Sections 621(a)(1), 625 or 626 of the Communications Act may commence an action" in an appropriate state or federal court and seek "any appropriate relief consistent with the provisions of [Sections 621(a)(1), 625, or 626]."[175] Section 635A specifically recognizes that both injunctive and declaratory relief is available.[176] Further, under Section 636, any provision of any new franchise *granted* by an LFA that is inconsistent with the Act (including the Commission's implementing regulations) is not binding on cable operators. Rather, such provision is to be deemed preempted and superseded.[177]

By its terms, Section 621(a)(1) prohibits LFAs from "unreasonably refus[ing] to award an additional competitive franchise."[178] This injunction goes beyond an LFAs affirmative denial of franchises, because if an LFA makes any requirement or fee a condition of the franchise, one may presume that the LFA would otherwise not have granted the franchise. Where an LFA insists upon an unreasonable condition and withholds the grant of the franchise unless the applicant capitulates, that insistence is the equivalent of an unreasonable refusal to grant the franchise. In addition to demanding unreasonable conditions, any unwarranted delay in the grant of a franchise constitutes an unreasonable refusal to award a franchise, and contravenes

---

175 47 U.S.C. § 555(b).

176 47 U.S.C. § 555a(a).

177 47 U.S.C. § 556.

178 47 U.S.C. § 544(a)(1).

Section 621(a)(1).[179] As discussed earlier in these comments, applicants will often abandon a franchise application if the delays become excessive, often because the perceived opportunity to enter and succeed in the market has become stale. To further the congressional and important national objectives of competitive provision of fiber-based cable services and franchising that is subject to nationally consistent standards, the Commission should seize this opportunity to adopt implementing regulations that ensure that LFAs do not unreasonably refuse to grant additional cable franchises within their jurisdiction through delays or attempts to implement unreasonable conditions.

Enforcement of regulations implementing Section 621(a)(1) will be achieved through the courts, as contemplated by Sections 635 and 635A. An aggrieved applicant who is subjected to unwarranted delays – as defined by the Commission regulations and, urged below – or required to comply with unreasonable demands shall have the ability to bring an action to the courts for prompt injunctive and declaratory relief. Adopting regulations more explicitly defining what are reasonable franchising processes and requirements, will assist judicial review.

Apart from the ability to proceed under Section 635 in state or federal court to enforce the regulations discussed below, an aggrieved applicant will also have a private right of action to enforce the Communications Act in federal court under Section 1331 of Title 28.[180] "Even in the absence of an explicit statutory provision establishing a cause of action, a private party may ordinarily seek declaratory and injunctive relief against state action on the basis of

---

179 While such a reading is implicit in Section 621(a)(1), in a related context, Congress recognized that the failure to process a renewal application in four months constituted a "final decision" for purposes of involving judicial review by a federal district court.

180 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

federal preemption."[181] The Supremacy Clause creates preemption of state laws that conflict with federal laws, including Commission regulations adopted pursuant to Communications Act.[182] Therefore, an aggrieved party can seek injunctive relief to enforce the Commission's rules in federal court under the Supremacy Clause,[183] where the actions of a state or LFA conflict with the Commission's regulations interpreting Title VI, as well as the provisions of the statute itself.

VII. COMMISSION REGULATIONS SHOULD PROHIBIT UNREASONABLE FRANCHISE CONDITIONS AND AVOID EXCESSIVE DELAYS IN THE AWARDING OF FRANCHISES

As described in earlier sections, the franchising process as implemented by numerous LFAs across the country continues to suffer from numerous flaws that frustrate the twin Congressional objectives of promoting cable competition and fostering deployment of advanced services to all Americans. The FTTH Council has shown that the Commission has the jurisdictional authority to adopt binding rules interpreting the provisions of the Communications Act to advance the industry toward these objectives. Such regulations will be enforceable under the Supremacy Clause, Sections 624, 635 and 636 of the Communications Act, and Section 1331 of Title 28. This section discusses the rules the Commission should adopt rules to give LFAs the

---

181 *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1269 (9th Cir. 1994).

182 *City of New York v. FCC*, 486 U.S. at 62; *see also, Bud Antle, Inc., supra*.

183 *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1090 (N.D. Cal. 2001) *aff'd*, No. 03-15852, D.C. No. CV-01-00663-SI (9th Cir. Jan. 12, 2006); *see also Shaw v. Delta Airlines*, 463 U.S. 85, 96 n.14, 103 S. Ct. 2890, 2899 n.14, 77 L. Ed. 2d 490 (1983) ("A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve").

guidance regarding, and set appropriate bounds on, franchising decisions consistent with the provisions of the Act.

Specifically, as detailed below, the Commission should adopt regulations articulating what constitutes an "unreasonable refus[al] to award an additional competitive franchise" under Section 621(a)(1). The Commission's regulations should make clear that an LFA must act within a specific period of time after an application is received, or its failure to Act will be deemed an "unreasonable refusal" to award a franchise. The Commission should also preempt local, as well as state-wide, level playing field provisions as amounting to an unreasonable refusal in violation of Section 621(a)(1). Furthermore, the Commission should provide better definition on what LFAs can and cannot do without amounting to an "unreasonable refusal" in a competitive environment when acting under Section 621(a)(4) in relation to build out requirements, PEG channels, and financial, technical, and legal qualifications. Finally, the Commission should adopt rules that limit the collection of franchise fees that are related to the actual and reasonable costs the LFA expends in managing the public ROW and administering the franchising process.

A. THE COMMISSION SHOULD ADOPT A TIME LIMIT FOR FRANCHISE APPLICATION REVIEW

As discussed above, delays of more than three or four months in the franchising process can dissuade an applicant from pursuing its application, which deprives consumers and businesses of the added benefits of competition, not only in the video marketplace but – where the applicant is seeking to offer the triple play of video, voice, and data – in the area of voice and data services as well. On many occasions, the process can take six, nine or *more* months, during which time LFAs typically are seeking to force unreasonable requirements upon would-be new entrants or giving incumbents an opportunity to pursue stalling tactics.[184] Even where the process takes as little as four months, the evidence provided with these comments demonstrates that applicants may begin to consider whether continuing with the franchising process makes business and economic sense. Texas has largely eliminated problems associated with these unreasonable delays by adopting a statewide franchising process which must be completed before the 17th day after filing followed by local permitting.

The Commission should act to prohibit unreasonable delays. The FTTH Council would prefer a limitation akin to the Texas statutory requirement of completion prior to the 17th day after filing. However, should the Commission seek a longer period, the evidence indicates that delays of more than four months may lead an applicant to withdraw its interest in bringing video and other advanced services to a community.[185] Accordingly the Commission should adopt a regulation that, for purposes of Section 621(a)(1), the failure of an LFA to act on an application for an additional franchise within at most four months constitutes an unreasonable refusal to award a franchise.[186] This period of time is not only borne out by the evidence, but it is consistent with Section 626, which limits renewal processing to four months.[187] The time provided for renewals is a relevant measure because new cable entrants will be competing with the incumbents. In an effort to promote competition, it would be sound public policy to require LFAs to process new applicant requests within the same time frame, especially in light of the

---

184 Sarwal Declaration at ¶ 3.

185 Boccucci Declaration at ¶ 11.

186 With the 120-day time period, the FTTH Council recommends that the Commission adopt procedures that require Commission notification if the parties are still in negotiations after 90 days in order to alert the Commission of a possible preemption claim to the Commission.

better defined parameters under which LFAs would conduct their franchising activities pursuant to the other regulations the FTTH Council urges the Commission to adopt herein.

The Commission should also make clear that the failure to act within four months constitutes a "final decision" allowing the applicant to seek injunctive and/or declaratory relief under Sections 635(a) and (b) and Section 635A.[188] Treating the failure of an LFA to act within a certain time frame as a "final decision" promotes the intentions of Congress that applicants have recourse to the courts under Section 635 when LFAs contravene the substantive requirements of Section 621(a)(1), Section 625, and Section 626. If such inaction is not deemed a "final decision," new applicants may be deprived of any opportunity for court review of much LFA activity that is contrary to Section 621(a)(1) relief under Sections 635 and 636, contrary to the intentions of Congress, because an LFA could simply decline to make a decision.

The similar structure of each of the three sections, Sections 621(a)(1), 625, and 626, supports this conclusion. For example, Section 625(a)(1) allows for cable operators to seek modifications of the requirements in a franchise modification, and Section 625(a)(2) grants cable operators the ability to seek court review of the LFA's response to such requests under Section 635.[189] Similarly, various subsections of Section 626 sets forth the rights of cable operators to seek renewals of their franchises from LFAs and procedures regarding such requests, including the four month time period in which to act described above. Section 626(e) grants cable operators the ability to seek court review of the LFA's response to renewal requests under

[187] Similarly, Section 625(a)(2) limits LFA review of requested modifications covered by that section to 120 days. 47 U.S.C. § 545(a)(2).

[188] Failure to act in accordance with a regulation setting a time limit would also give an affected applicant the right to bring an action against the LFA to act under 28 U.S.C. § 1331.

[189] 47 U.S.C. § 545.

Section 635, including where the LFA simply fails to act in accordance with the procedural requirements.[190] In the same way, in Section 621(a)(1) Congress set forth the general standard that the LFAs must follow when receiving a franchise application, supplemented by other prescriptions and allowances, for example in Section 621(a)(4). Section 621(a)(1) also provides that where an LFA contravenes that general standard – "unreasonable refusal to award an additional franchise" (which may be further defined through Commission regulations as the FTTH Council urges here) – the cable operator may resort to court review under Section 635. As such, Congress clearly intended that the award of an exclusive franchise and the unreasonable refusal to award an additional franchise, whether by outright denial or unreasonable delay (or condition), was subject to court review under Section 635(a). If this were not the case, as noted earlier, an LFA could indefinitely avoid court review of its failure to act by simply choosing never to act, a result Congress could hardly have intended.

B. LEVEL PLAYING FIELD STATUTES AND PROVISIONS SHOULD BE PREEMPTED

As explained above, LPF provisions have the effect of stifling, not promoting competition, by saddling new entrants with uneconomic requirements assumed by the incumbents when they entered the markets as *de facto* or *de jure* monopolies, but without the same opportunity as the incumbents to recover the costs of such requirements. As such, LPFs are not consistent with the Communications Act. Section 636 requires *state and local* actions to be consistent with the Communications Act, including the provisions within a franchise.[191] Where they are inconsistent, the Congress has expressly found that they are to be deemed

190 47 U.S.C. § 546.

191 47 U.S.C. §§ 556(a)-(c) (*emphasis supplied*).

superceded and preempted.[192] To remove any doubt, the Commission should issue a regulation that LPF provisions, whether in contracts, local ordnances, or state statutes or rules, are in conflict with Congress's objectives in Title VI and that they are preempted. Where LFAs insist on enforcing the LPF in state law or within a local cable franchise, new applicants should be entitled to enforce the Commission's regulation preempting such conflicting state and local provisions by going to federal or state court and obtaining an injunction.

C. <u>Build-Out Requirements Must Be Limited to the Franchise Area Selected by the Applicant and Take Into Account the Competitive Environment in Which Additional Franchises Are Constructed</u>

Section 621(a)(4) requires LFAs to allow cable operators a "reasonable period of time to become capable of providing cable service to all households in the franchise authority."[193] The Commission should adopt a rule providing that when an LFA insists on franchise requirements being imposed on a new entrant that fail to provide a reasonable time for build-out or dictates the geographic areas where new entrants must build, it is unreasonably refusing to award a license in violation of Section 621(a).

New entrants, consistent with other provisions of the Communications Act, must not be forced to build-out systems that are coterminous with the systems of the incumbents, although they may choose to do so.[194] Those systems were financed in a monopoly environment, to require new cable operators, as a condition of entry, to build-out to all such areas would be unreasonable given the much different environment for new entrants today.[195] Rather, new

---

192 47 U.S.C. § 556(c).

193 47 U.S.C. § 541(a)(4).

194 Verizon Comments at 9; Boccucci Declaration at ¶ 10.

195 In the MVS marketplace, as the Commission notes in the *12th Annual Assessment Report Press Release,* competition, consumers and businesses have the choice not only of the

. . .*Continued*

entrants must be able to designate the areas in which they intend to build their systems, provided that they do not avoid designating certain areas "because of the income of the residents in which such group resides."[196] Once such a franchise area is defined by the new entrant consistently with these principles, the LFA may impose reasonable build-out requirements, but such requirements must take into account the need for new entrants to recoup their investment in their facilities in a competitive MVS environment.

Accordingly, the Commission should adopt regulations that (1) allow new entrants to designate their franchise areas; and (2) allow LFAs to require adherence to a build-out schedule into the designated area that takes into account the fact that new entrants, unlike the incumbent, is constructing its system in a competitive environment.[197] In the event the LFA conditions approval based on build-out requirements extended into areas not designated in its application, and the LFA cannot demonstrate that the exclusion of such area is not forbidden by the Communications Act,[198] the new entrant should be able to seek injunctive relief under Sections 621(a)(1) and 635(a) based on the LFA's unreasonable refusal to award a competitive franchise.

---

incumbent cable operator, but satellite and perhaps other wireless alternatives as well. *12th Annual Assessment Report, Press Release* at 1.

196 *See* 47 U.S.C. § 541(a)(3).

197 As part of its regulation limiting build-out requirements, the Commission should prohibit a LFA from requiring new entrants that are telecommunications providers to bury their cable plant unless they are already required to do so under telecommunications law.

198 *See* 47 U.S.C. § 541(a)(3) (authorizing a franchising authority to assure that access to cable service is not denied to a prospective residential area based on income of the residents in that area).

D. <u>REQUIREMENTS RELATED TO PEG CHANNELS MUST BE STRICTLY CIRCUMSCRIBED AND NON-VIDEO REQUIREMENTS SHOULD BE PROHIBITED</u>

The Communications Act currently allows LFAs to require "adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support."[199] When a new cable operator seeks to enter the market, the incumbent is, almost by definition, already providing the PEG channels pursuant to its franchise. While it may be reasonable to have the new entrant provide access to the same number of PEG channels as the incumbent, provided such requirements are consistent with Section 611,[200] the LFA cannot simply require that the new entrant to agree to all PEG channel provisions applicable to the incumbent without modification. In addition, incidental commitments, such as scholarships for interns that have worked with PEG channels, which are not directly related to the operation of the PEG channels should not be allowed – even if the incumbent cable operator agreed to such requirements. Rather, commitments should be related only to services, facilities, and equipment to enable the use and operations of the PEG channel capacity

The Commission should adopt a rule that any requirements imposed on the new applicant must be directly related to the facilities used for or financial support for use of the PEG channels. LFAs should be precluded from imposing completely duplicative requirements on additional franchisees that have been imposed on incumbent cable operators. Thus, for example, if the incumbent funds a PEG channel studio, the new entrant should only be required to contribute a *pro rata* share of the incumbent's ongoing financial obligation for that studio, based on the number of subscribers the incumbent and the new entrant (and any other entity with PEG

---

[199] 47 U.S.C. § 541(a)(4)(B).

obligations, such as open video system operators) have within the incumbent's franchise area. The same market share-based *pro rata* principle should apply to other services, facilities, and equipment directly related to the use of the PEG channels, to the extent that the need for the services, facilities, and equipment are independent of the number of MVS providers that carry the PEG channels. Absent a *pro rata* contribution rule, based on the number of subscribers of each obligated entity, LFAs can burden MVS providers with duplicative and inefficient obligations, without increasing the benefit to the public from PEG channels

In this regard, the Commission should also adopt regulations that require incumbent cable operators to permit new entrants to connect with the incumbent's pre-existing PEG access channel feeds. The incumbent and the new entrant should be free to decide how to accomplish this connection, with LFA involvement if that cannot be accomplished in a timely manner. While the new franchisee should be required to compensate the incumbent for its actual costs in providing the connection, the costs of the connection should be deducted from the new franchisee's PEG-related financial obligations to the LFA. Where an LFA demands that an applicant adhere to PEG channel requirements inconsistent with the regulations the FTTH Council urges the Commission to adopt, the applicant should be able to seek the injunctive relief of the courts to enforce the Commission's rules.

Finally, any requirements not strictly related to the requirements of the Communications Act should be expressly prohibited. These include such items as agreement "acceptance fees," upfront or advance payments, connecting non-cable facilities, general community grants, and other incidental commitments often imposed by LFAs.

---

[200] 47 U.S.C. § 531.

E. LFAs Should Be Permitted to Impose Fees Based Only on Their Actual and Reasonable Costs of Managing the Public ROW

As described above, LFAs typically impose fees that bear no relationship to their actual or reasonable costs in managing cable operators' use of the public ROW. Instead, even ignoring the hidden costs of various in-kind contributions, they typically impose the full 5% of gross revenues fee permitted under the Communication Act.[201] Congress intended the 5% fee to be a limit on fees LFAs collect as recompense for its management of the public ROW, not a signal that this was the rate to be collected in all scenarios and circumstances, which is how most LFAs have interpreted it. Like the other requirements imposed on new entrants discussed above, the fees LFAs set must not frustrate the Congress's objectives in furthering cable competition and the deployment of advanced services. Otherwise, they conflict with Section 621(a)(1). LFAs must set fees tempered by the potentially deleterious effect on competition in the video, voice, and data marketplaces, which are fast converging. Recognizing that LFAs do incur costs as a result of managing the public ROW, the Commission should adopt regulations permitting LFAs to recover their actual and reasonable costs of managing the public ROW, but no more, so as to ensure that new entrants can compete against other MVS-provider rivals, such as DBS and wireless providers, both of whom are not assessed such fees.[202] The Congress separately allows LFAs to recover costs associated with administering and enforcing franchises,[203] and makes clear that capital costs related to PEG channels do not apply to the 5% ceiling.[204] What the LFA

201 47 U.S.C. § 542(b).

202 For cable operators that are already paying a franchise fee as a telecommunications provider pursuant to law for costs imposed for use of ROW, the Commission should consider crediting that amount against any franchise imposed pursuant to Section 622.

203 47 U.S.C. § 542(g)(2)(D).

204 47 U.S.C. § 542(g)(2)(C).

charges otherwise should not undo the proscriptions on LFA activity urged herein by the FTTH Council. Therefore, the Commission should interpret "franchise fee" to include a fee designed to recover the actual and reasonable costs a cable operator places on the public ROW. As with the other regulations advocated herein, where an LFA seeks to recover fees that exceed its actual and reasonable costs in managing the public ROW, a new entrant should be entitled to seek injunctive remedies from an appropriate court per Sections 635 and 635A of the Communications Act.[205]

F. LFA ACTION THAT IS LIKELY TO HAVE THE EFFECT OF LIMITING THE PROVISION OF A TELECOMMUNICATIONS SERVICE MUST BE PROHIBITED

Section 621(b)(3)(B) of the Act prohibits franchising authorities from imposing any requirement that "has the purpose *or effect* of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator."[206] Where a new entrant seeks to provide not only cable video service, but also voice and data telecommunications as well, unreasonable delays by the LFA in granting the cable franchise will have the effect of "prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service." In the converged services marketplace, delays in obtaining approval for a cable franchise, or unreasonable requirements attached to that approval, will either slow the provision of the telecommunications services or place unreasonable burdens on such provision. The Commission must ensure that while processing the franchise agreement does not

---

205 The Commission, by adopting this rule, will not be regulating the "amount" of the franchise fees that are imposed on the cable operator – which will still be set by the LFA and limited to 5% of the gross revenues, regardless of the actual and reasonable costs the LFA incurs. Moreover, LFAs may use the actual funds received from the LFA in any manner it sees fit, so the proposed rule will not run afoul of Section 622(i). *See* 47 U.S.C. § 542(i).

206 47 U.S.C. § 541(b)(3)(B).

unreasonably delay the deployment of telecommunications services. Accordingly, the Commission should adopt a regulation that makes clear that, where a new entrant seeks to provide telecommunications as well as video services, any action or inaction by the LFA that has "the effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service" is expressly prohibited under Section 621(a)(1) and will be deemed an unreasonable refusal by the LFA, subject to the courts' injunctive relief powers under Sections 635 and 635A.

VIII. CONCLUSION

For the foregoing reasons, FTTH Council respectfully request that the Commission grant the relief requested herein.

Respectfully submitted,

Erin W Emmott

Thomas W. Cohen
Edward A. Yorkgitis, Jr.
Erin W. Emmott
Theresa Gaugler
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)
EEmmott@kelleydrye.com

February 13, 2006